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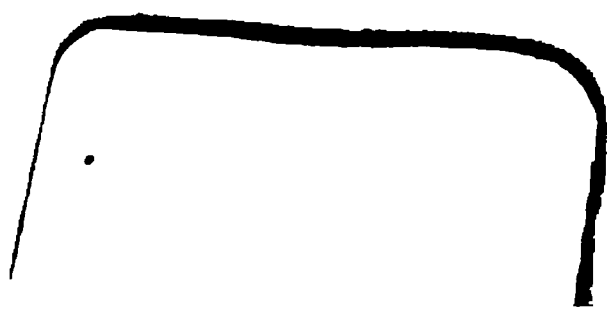
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ADDISON ON CONTRACTS:

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A TREATISE

ON

THE LAW OF CONTRACTS.

BY C. G. ADDISON, Esq.,

AUTHOR OF THE "LAW OF TORTS."

EIGHTH EDITION.

BY HORACE SMITH,

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ADDISON ON CONTRACTS.

VOL. III.

without the money. (*p*) Where a party has his election of doing one of two things, and makes his election, he is bound by it. (*q*) Thus where a man has got the right to elect whether he will avail himself of a forfeiture and avoid a lease or other contract, and once makes his election, he makes it for ever. (*r*) So if a purchaser, on the delivery of goods, has a right to elect whether he will pay by bill or cash, and fails to give the bill, he will be deemed to have made his election to pay cash, and cannot afterward revoke it. (*s*)

Time of Performance.¹—Where no time is fixed for the performance of the contract, it must be performed within a reasonable time, according to the circumstances. (*t*) A contract to do a particular thing “directly,” or “as soon as possible,” or “forthwith,” does not mean that it is to be done *instantly*, but there must be no delay in performance; and such a contract requires a much more speedy fulfilment than a contract to do a thing within a reasonable time. (*u*) When a party covenants to pay money “immediately on demand,” the word “immediately” must receive a reasonable construction, so as to allow the debtor time to procure the money; and if the demand is not made by the creditor himself, to inquire into the authority of the person making it. (*x*) In the case of a covenant to pay rates, the payment must be made within a reasonable time after the rate is made, and public notice given thereof on the church door. It is not necessary to give the covenantor notice to pay, or to make any personal demand upon

¹ As to time and mode of performance of contracts for sale of land, and when time is of the essence of the contract, see *ante*, p. * 891 and American note; *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 34, and note, *ib.* 77.

(*p*) *Fordley's case*, 1 Leon. 68.

(*q*) *Co. Litt.* 146; *Brown v. Royal Ins. Soc.*, 28 L. J. Q. B. 278; 1 El. & El. 853; *Gath v. Lees*, 3 H. & C. 558; see *Borroman v. Free*, 4 Q. B. D. 500, C. A.

(*r*) *Ward v. Day*, 33 L. J. Q. B. 13; 5 B. & S. 359.

(*s*) *Rugg v. Weir*, 16 C. B. n. s. 477.

(*t*) *Rolfe, B., Startup v. Macdonald*, 6 M. & G. 593, 610; *Hales v. London & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J. Q. B. 292.

(*u*) *Duncan v. Topham*, 8 C. B. 225;

Attwood v. Emery, 1 C. B. n. s. 110; 26 L. J. C. P. 73; *Toms v. Wilson*, 4 B. & S. 442; 32 L. J. Q. B. 382; *Roberts v. Brett*, 20 C. B. n. s. 148; 34 L. J. C. P. 241; *Brighty v. Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38.

(*x*) *Toms v. Wilson*, 4 B. & S. 442;

32 L. J. Q. B. 382; *Brighty v. Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38; *Massey v. Sladen*, L. R. 4 Ex. 13; 38 L. J. Ex. 34.

him, it being his duty to seek out the proper parties
 * to whom the rates are to be paid. (*y*) Where a rail- [* 1189]
 way company had contracted with the plaintiff for the
 supply of 350,000 railway sleepers within a certain limited period,
 to be delivered from time to time in such quantities as should
 be required, it was held that the company was bound to give the
 orders, and take the whole quantity, within the specified period. (*z*)
 Whenever time has not been made of the essence of the contract,
 and either party is guilty of delay, a notice in writing by the other
 to the effect that he shall consider the contract at an end if it be
 not completed within a named period (the same being a reason-
 able time for its completion), will be binding on the party to
 whom it is given. (*a*) A person who has covenanted to do a
 particular act, impliedly covenants to do nothing which must
 necessarily have the effect of preventing him from performing
 his covenant. (*b*) And where a party has agreed to do a particu-
 lar act, and has deprived himself of the power of performance,
 or has absolutely and unconditionally refused to perform it, (*c*)
 he may be sued for damages before the expiration of the time
 limited for performance, (*d*) even where the performance is made
 to depend on a contingency. (*e*) By the Bank Holidays Act,
 1871, (*f*) no person can be compelled to do any act upon the
 bank holidays thereby established which he would not be com-
 pelled to do on Christmas Day or Good Friday; and the obliga-
 tion to do such act is postponed to the day following such bank
 holiday. By the Judicature Act, 1873, sect. 25 (7), "Stipulations
 in contracts as to time or otherwise, which would not before the
 passing of this act have been deemed to be or to have become of
 the essence of such contract in a court of equity, shall receive in

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| (<i>y</i>) <i>Davis v. Burrell</i> , 10 C. B. 821. | 1a <i>Tour</i> , 2 E. & B. 678; 22 L. J. Q. B. 455. |
| (<i>z</i>) <i>Great Northern Ry. Co. v. Harrison</i> , 12 C. B. 576; 22 L. J. C. P. 49. | (<i>d</i>) <i>Lovelock v. Franklyn</i> , 8 Q. B. 378; <i>Short v. Stone</i> , ib. 369; <i>Ford v. Tiley</i> , 6 B. & C. 325; <i>Bowdell v. Parsons</i> , 10 East, 359; <i>Wild v. Harris</i> , 7 C. B. 1004. |
| (<i>a</i>) <i>Reynolds v. Nelson</i> , 6 Mad. 26; <i>Sudg. Vend.</i> 306, 307. | (<i>e</i>) <i>Frost v. Knight</i> , L. R. 7 Ex. 111; 41 L. J. Ex. 78. |
| (<i>b</i>) <i>Stirling v. Maitland</i> , 34 L. J. Q. B. 3; 5 B. & S. 840. | (<i>f</i>) 34 Vict. c. 17, sect. 3; see also 38 Vict. c. 13. |
| (<i>c</i>) <i>Danube & Black Sea Ry. Co. v. Xenos</i> , 11 C. B. n. s. 152; 13 ib. 825; 31 L. J. C. P. 84, 284; <i>Hochster v. De</i> | |

all courts the same construction and effect as they would have heretofore received in equity."

Conditions precedent to Performance.¹ — Sometimes the performance of a contract by one party depends on something to be previously done by the other; and when that is the case, an action will not lie for non-performance, if default has been made in the accomplishment of the precedent act; for if you desire to perform a contract, you must first put yourself right by performing your part of the contract, or being ready and willing to do

so. (g) Where shares are sold upon the faith of an [* 1190] undertaking * by the vendors to take them back at the expiration of six months from the date of the sale if the shares do not in the meantime rise in the market, a tender of the shares by the purchaser to the vendor is a precedent act to be performed by the purchaser before there can be any default

¹ Proper construction of stipulations that service shall be rendered, goods shall be furnished, &c. "to the satisfaction" of the promisee, or a referee on his behalf, see an article on Contracts to Satisfaction, 21 Alb. L. J. 465; *Willey v. School Dist. No. 1*, 25 Mich. 419; *Neenan v. Donoghue*, 50 Mo. 493; *Wyckoff v. Meyers*, 44 N. Y. 143; *Snell v. Brown*, 71 Ill. 133; *Dullaghan v. Fitch*, 42 Wis. 679; *Wilson v. Gould*, 21 Hun, 446; *Schenke v. Rowell*, 7 Daly, 286; *Sullivan v. Byrne*, 10 S. C. 122; *Sweeney v. United States*, 15 Ct. of Cl. 400; *Dingley v. Greene*, 54 Cal. 333; *Clark v. Rice*, 46 Mich. 308; *McGovern v. Bockins*, 10 Phila. 438; *Downey v. O'Donnell*, 86 Ill. 49; *Burmeister v. New York Elevated R. R. Co.*, 47 N. Y. Superior Ct. 264; *Hartup v. Pittsburgh*, 97 Pa. St. 107. See also *ante*, p. * 394.

Provisions in a railroad construction contract making the contractor's compensation to depend upon the opinion or award of a person in the employ of the company, may, though severe and highly penal, be enforced. *Phelan v. Albany, &c. R. R. Co.*, 1 Lans. 258.

Although an agreement between parties having in view existing matters in controversy, that such questions shall be submitted to arbitration, will not be enforced by the courts to the extent of ousting the courts of their jurisdiction and leaving the parties to the private tribunal, yet where by the same agreement, which creates a liability and gives a right, it is made a condition precedent to a right of action thereon, either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon, such condition is valid; and in case of such disagreement, and in the absence of fraud, there is no cause of action, under the agreement, either at law or in equity, until the award is made as provided. *Delaware, &c. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250.

(g) *French v. Campbell*, 2 H. Bl. 178; *Duke of Marlborough v. Osborn*, 33 L. J. Q. B. 148; 5 B. & S. 67.

on the part of the vendor, or any breach of his undertaking. (*h*) "Where mutual covenants," observes Lord Mansfield, "go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, and where a recompense may be had in damages, there the defendant has a remedy upon his covenant, and shall not plead it as a condition precedent." Thus where the plaintiff, in consideration of £500 and an annuity, conveyed to the defendant a plantation, together with the stock of negroes upon it, and covenanted that he had a good title to the plantation and negroes, and the defendant covenanted for payment of the annuity, and the plaintiff brought his action for the breach of this covenant, and the defendant pleaded that the plaintiff was not legally possessed of the negroes, it was held that, as the breach went only to a part of the consideration, and might be paid for in damages, the defendant should not rely on the performance of the entire covenant as a condition precedent; Lord Mansfield observing that, if the plea was to be allowed, any one negro, not being the property of the plaintiff, would bar the action. (*i*) And where a plaintiff covenanted to take out two hundred and eighty passengers to Jamaica, and the defendant covenanted to have them ready for shipment, and to pay £5 a man for their conveyance, and the plaintiff only took and carried one hundred and eighty of them, it was held that the contract was divisible, and that the plaintiff was entitled to maintain an action in respect of his partial performance of the contract. (*k*) Where the conditions of a sale by auction stated that the lots were to be "cleared away within three days after the sale at the purchaser's expense," this was held not to be a condition precedent to the plaintiff's right to claim delivery. (*l*) Where a covenant for the performance of various acts and duties by one party constitutes the consideration for a subsequent covenant by another

(*h*) *Blackwell v. Nash*, 1 Str. 535; *E. 605*; *Newson v. Smythies*, 3 H. & N. 840; 28 L. J. Ex. 97; *London Gas Co. v. Skillingworth*, 1 Raym. 686; *Jones v. Barkley*, 2 Doug. 684; *v. Chelsea Vestry*, 8 C. B. N. s. 215; *Startup v. Macdonald*, *ante*, p. *1188. *East. Co. Ry. Co. v. Philipson*, 16 C. B. 12.

(*i*) *Boone v. Eyre*, 1 H. Bl. 273 (n.); (*k*) *Tomson v. Noel*, 1 Lev. 16; 1 Le Blanc, J., *Glazebrook v. Woodrow*, 8 Keb. 100.
T. R. 375; *Franklyn v. Miller*, 4 Ad. & (*l*) *Woolfe v. Horne*, 2 Q. B. D. 355.

party, it is not in all cases essential that there should be an exact performance of the precedent covenant in every minute [* 1191] particular, in order to create a * liability upon the subsequent covenant. (*m*) The time appointed for the performance of some precedent act or condition is sometimes of the very essence of the contract, so that if the party who was to do the act fails in performance at the time specified, he is liable in damages to the party in whose favor the act was to be done, and the latter is enabled to decline all farther performance of the contract, (*n*) unless the condition or precedent act has been waived by acceptance of part performance, so as to render it a mere collateral stipulation. (*o*) When one thing only is to be done by a day named, it depends on the course of trade and the intention of the parties whether the time appointed for the doing of the act is of the essence of the contract or not; but when the contract is for the performance of several acts and duties at different periods of time, the performance of any particular act at the exact period specified will not be a condition precedent to the right of action upon the contract, unless the neglect has had the effect of precluding the defendant from deriving any benefit or advantage from the contract. (*p*)

Demand of Performance, when necessary. — Where a penalty or forfeiture attaches for non-payment of money or for non-performance of a particular act after demand, demand of performance is a condition precedent to a right of action for the penalty or the forfeiture; (*q*) and personal demand is, in these cases, generally necessary, so that demand made upon the wife or servant of the party in his absence, though made at his dwelling-house, is insufficient. (*r*) Where, by the express terms of a contract, the duty to pay money or to render some particular service is not to arise until *after* demand has been made, there is

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| (<i>m</i>) Campbell v. Jones, 6 T. R. 573; | (<i>p</i>) Payne v. Banner, 15 L. J. Ch. |
| Glazebrook v. Woodrow, 8 T. R. 375; | 227. |
| Carpenter v. Creswell, 1 M. & P. 77; | (<i>q</i>) Carter v. Ring, 3 Campb. 460; |
| Stavers v. Curling, 3 Sc. 740; 3 Bing. | Fitz-Hugh v. Dennington, 6 Mod. 227, |
| N. C. 355. | 259; Toms v. Wilson, 4 B. & S. 442; |
| (<i>n</i>) Tidey v. Mollett, <i>ante</i> , p. *179; | 32 L. J. Q. B. 33, 382. |
| Hoare v. Rennie, 5 H. & N. 19; 29 L. J. | (<i>r</i>) See as to license to distrain after |
| Ex. 73; Honck v. Muller, 7 Q. B. D. 92. | demand, Belding v. Read, 3 H. & C. |
| (<i>o</i>) Behn v. Burness, <i>ante</i> , p. *191. | 955; 34 L. J. Ex. 212. |

no cause of action until demand has been made. Thus where a man covenants or agrees to pay the debt of some third party on demand, or to deliver up a bond to be cancelled on request, there the demand or request is a condition precedent to the existence of any cause of action. (*s*) So when a promissory note is made for the payment of a certain sum of money within a certain limited time after demand, there is no debt or duty or cause of action, * until demand has been made, and [*1192] the time limited has elapsed. (*t*) Where, however, there is a debt due, and a covenant or promise by the debtor to pay the debt on request, no request need be made; for the law casts upon the debtor the duty of seeking out his creditor whilst he remains within the realm of England, (*u*) and paying the money without any request. (*x*) A plea, therefore, that he has not been requested to pay the money is a nullity. (*y*) And where the bond, covenant, or promise is for the payment of money generally, the duty to pay arises as soon as the contract is made, and may be at once enforced by action. When the instrument provides for payment by a day named, there is no debt due, or cause of action, until the day arrives; and then the issue of a writ is the only demand that need be made; (*z*) and wherever a debt accrues, or a duty to pay arises, on the performance of certain stipulated acts by the plaintiff, and the precedent acts are done, the duty of performance on the part of the defendant arises without any request on the part of the plaintiff. (*a*) In the case of a mortgage of chattels by a bill of sale containing a condition that, if the mortgagor do not imme-

(*s*) *Sicklemore v. Thistleton*, 6 M. & S. 9; *Topham v. Braddick*, 1 Taunt. 573; *Simpson v. Routh*, 2 B. & C. 682; *Bach v. Owen*, 5 T. R. 409; *Bowdell v. Parsons*, 10 East, 360; *Peck v. Methold*, 3 Bulst. 297; *Webb v. Martin*, 1 Lev. 48.

(*t*) *Thorpe v. Booth*, R. & M. 388; *Holmes v. Kerrison*, 2 Taunt. 323.

(*u*) Co. Litt. 210 b. Where the debt is payable abroad, the debtor must seek his creditor abroad. *Fessard v. Mugnier*, 18 C. B. n. s. 286; 34 L. J. C. P. 126.

(*x*) *Collins v. Benning*, 12 Mod. 444; *Wallis v. Scott*, 1 Str. 88; *Master Butcher's, &c. Co. v. Bullock*, 3 B. & P. 434.

(*y*) *Capp v. Lancaster*, Cro. Eliz. 548; *Thomson v. Butler*, ib. 721; *Rumball v. Ball*, 10 Mod. 38.

(*z*) *Gibbs v. Southam*, 5 B. & Ad. 911; *Frampton v. Coulson*, 1 Wils. 33; *Absolom v. Gething*, 32 Beav. 322; 32 L. J. Ch. 786.

(*a*) *Spaeth v. Hare*, 9 M. & W. 326.

diately, upon demand in writing being delivered to him, pay the mortgage-money and interest, it shall be lawful for the mortgagee to take possession of and sell the subject-matter of the mortgage, the mortgagor has a reasonable time, after the demand has been made, to procure the money, and to inquire into the authority of the person making the demand to receive the money. (*b*)

Waiver of Demand of Performance.—When a request or demand of performance is, by the contract, made a condition precedent to any liability for non-performance, if the party who is to do the act has disabled himself from performance, the stipulation as to the request is dispensed with. (*c*)

Dispensation of Performance of Conditions precedent.—That which is a condition precedent to the liability upon a covenant or promise when the contract is made may cease to be so by the subsequent conduct of the covenantor or promisor in treating the contract as a continuing contract, and taking the benefit of a part performance of it, after the expiration of the time appointed for the fulfilment of the condition. (*d*) A man may

[* 1193] always dispense * with the performance of a condition in his own favor; and if there are several precedent or contemporaneous acts to be performed, and the one party discharges the other from the performance of some of them, it is the same thing as if the things dispensed with had been done. (*e*) Thus if a vendor is to make out a good title to an estate, and a purchaser is to prepare and tender a conveyance to the vendor, and the latter is then to execute it, and the purchaser discharges the vendor from the duty of executing the conveyance, it is the same as if the vendor had actually executed it. (*f*) Every contract is, as we have seen, to be interpreted in connection with the surrounding circumstances; and the acts done by the contracting parties in fulfilment of the contract may be regarded in

(*b*) *Toms v. Wilson*, 4 B. & S. 442; 32 L. J. Q. B. 33, 382; *Massey v. Sladen*, L. R. 4 Ex. 13; 38 L. J. Ex. 34.

(*c*) *Bowdell v. Parsons*, 10 East, 361.

(*d*) *Newson v. Smythies*, 3 H. & N. 840; 28 L. J. Ex. 97; *White v. Beeton*, 30 ib. 376; 7 H. & N. 42.

(*e*) *Jones v. Barkley*, 2 Doug. 684.

As to when the dispensation must be by deed, see *Thames Iron, &c. Co. v. Roy. Mail St. P. Co.*, 31 L. J. C. P. 169.

(*f*) *Laird v. Pim*, 7 M. & W. 485; *Guardians of East London Union v. Metropolitan Ry. Co.*, L. R. 4 Ex. 309; 38 L. J. Ex. 225.

order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed; and the construction of the instrument may thus be varied by matter *ex post facto*. (g) When an incoming tenant, on taking possession of a farm, agreed to pay the outgoing tenant for the hay and straw a fair price, to be ascertained and settled by valuers appointed on both sides, and valuers were appointed who were unable to agree, and in the meantime the incoming tenant consumed all the hay and straw, it was held that he had dispensed with the valuation by two valuers, and must pay for the hay and straw whatever a jury might consider to be a "fair price." (h) Where the plaintiffs agreed to sell and the defendants to buy certain casks of butter, to be shipped in October, and the butters were not shipped until November, and that fact being communicated to the defendants, they at first demurred, but afterward assented, and received and retained the invoice and bill of lading, which was indorsed to them, and after that the vessel with the butters on board went ashore, and part of the butters was lost and the remainder damaged, and the defendants then repudiated the contract, contending that the condition, that the butters should be shipped in the month of October, had not been performed, it was held that the assent of the defendants to the shipment in November, and the acceptance by them of the indorsed bill of lading, amounted to a waiver of the precedent condition; and the condition being waived, it was the same as if it had never been inserted in the contract at all. (i)

* In certain cases, where a party intends to waive a [* 1194] condition in his favor, and to hold the other party liable notwithstanding the non-performance of the condition, he is bound to give notice of his intention. (k)

Tender of Performance. — If the act covenanted or agreed to be done by one party cannot be completed without the concurrence of the party for whom it is to be done, the former must do all that he can do without such concurrence to complete the

(g) *Pust v. Dowie*, *ante*, p. * 191.

N. C. 671; 1 Sc. 640; *Wing v. Harvey*,

(h) *Clarke v. Westrope*, 18 C. B. 32 L. J. Ch. 511.

784; 25 L. J. C. P. 287.

(k) *Morten v. Marshall*, 33 L. J. Ex.

(i) *Alexander v. Gardner*, 1 Bing. 54; 2 H. & C. 305.

act; and if he does this, he does what is equivalent in law to actual performance. (*l*) When goods are to be delivered, the tender must be made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods, in order to ascertain that the thing tendered was what it purported to be. (*m*) If a vendor is ready, and offers to deliver at the place appointed by the contract, and the purchaser insists upon a delivery at another and different place, this, if persisted in, is a refusal to accept according to the contract. (*n*)

Prevention of Performance.¹ — It is a principle of law, that he who prevents a thing from being done shall not avail himself of the non-performance which he has himself occasioned. Where, therefore, it was covenanted between the plaintiff and the defendant that the plaintiff should execute and deliver an assignment and general release to the defendant, and the plaintiff offered to assign and execute and deliver the release, and tendered a draft for the defendant's perusal, but the defendant refused to look at it, and said he would have nothing to do with it, it was held that the defendant had discharged the plaintiff from doing anything farther. "The party," observes Lord Mansfield, "who is to do the act must show that he was ready and willing to do it; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act." (*o*) If a man has covenanted to build a house on the land of a covenantee, performance of the covenant is excused if the covenantee will not suffer the covenantor to come upon the land to build, as he cannot lawfully come there without the permission of the covenantee. (*p*) So if a man has covenanted with me to collect my rents in such a hamlet, and I interrupt him in collecting them, this excuses him from

¹ *Peck v. United States*, 102 U. S. 64.

(*l*) *Hall v. Conder*, 26 L. J. C. P. 288. Raym. 686; *Ripley v. M'Clure*, *ante*, p. * 192; *Cort v. Ambergate, &c.*, 17

(*m*) *Startup v. Macdonald*, 7 Sc. Q. B. 148; 20 L. J. Q. B. 466. N. R. 297; 12 L. J. Ex 483; *Isherwood*

(*o*) *Jones v. Barkley*, 2 Doug. 694. *v. Whitmore*, 11 M. & W. 350. (*p*) 1 Rolle, Abr. *Condition* (N), pl. 3,

(*n*) *Lancashire v. Killingworth*, 1 p. 453.

the * performance of his covenant. (q) If the presence [* 1195] of the plaintiff was essential to the performance of the act, and the plaintiff, by his absence, has prevented performance, he has no ground of action for non-performance; for "whenever the plaintiff himself has occasioned the breach of contract, that is an answer to the complaint founded on that breach, not on the ground of an agreement, but because the act complained of was the act of the plaintiff himself, and not, as charged, the act of the defendant. The defendant may say, 'This is your own act; and therefore you are not damnified.'" (r) Where the lessee of a house covenanted to repair it, and some sparks of fire from the lessor's adjoining chimney fell on the house and burnt it, it was held that the lessee was not liable upon his covenant to repair the damage, the fire having been caused by the lessor himself. (s) If the obligee of a bond has himself prevented the obligor from fulfilling the condition of the bond, he shall never take advantage of the non-performance of the condition; for that would be enabling him to benefit by his own wrong. Therefore, if the condition of a bond be that the son of the obligor shall serve the obligee for a term of years, and the obligor tenders his son, and the obligee refuses to receive him, or takes him, and within the term commands him to go away, the condition will be deemed to have been fulfilled, and the bond will not be forfeited. (t) So if the condition be to build or repair a house, and the obligee, or another by his order, prevents the obligor from coming upon the land to build or repair it, or says that it shall not be built, or interrupts the building or repairing, performance of the condition is excused, and the bond discharged. (u) Where one of the two contracting parties so conducts himself as to subject the other to an action at the suit of some third person if he duly performs the contract, the non-performance is excused. (x)

(q) *Ib.* p. 454, pl. 7; *Doe v. Sutton*, C. & P. 706; *Inchbold v. Western Neilgherry Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(r) *Tindal, C. J., West v. Blakeway*, 2 M. & Gr. 751; *Com. Dig. Condition* (L) 5.

(s) 1 Rolle, Abr. p. 454, *Condition* (N), pl. 8.

(t) 1 Rolle, Abr. 455, *Condition* (P), pl. 1; (Q) pl. 1; *Hayward v. Bennett*, 3 C. B. 423; *Holme v. Guppy*, 3 M. & W. 389.

(u) 1 Rolle, Abr. 453, *Condition* (N).

(x) *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247.

Impossibility of Performance¹ is, in general, no answer to an action for damages for non-performance. If the thing to be done is notoriously physically impossible, and was known to be so by both parties at the time of the making of the contract, the contract will be a void contract, unless the promisor has taken upon himself to warrant that it is possible. (y)

[* 1196] If a married man *exchanges mutual promises of marriage with a single woman, it is no answer to an action by the latter to recover damages for non-performance to set up the illegality of a second marriage, unless the fact of the existing marriage of the promisor was known to the woman at the time of the making the contract, in which case it would be an illegal and void contract. (z) If the thing to be done was possible at the time of the making of the contract, but has become impossible since, the promisor is liable to an action for damages for non-performance, if he has either expressly or impliedly undertaken, without any qualification, to do it. Where the impossibility of performance has been occasioned by the act of a stranger, or by the act of the defendant himself, it constitutes no defence to an action. (a) Where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place, he was held to be responsible in damages for the non-performance

¹ Regarding impossibility of performance as a defence to actions on contract, see 2 Story, Contr. sect. 1334; 2 Pars. Contr. 672; 1 Pars. Contr. 556; 7 Wait, Act. & D. c. 32; article on Rescission of contract, &c., 25 Alb. L. J. 384; Dewey v. Union School Dist., 19 Am. L. Reg. n. s. 548, and note by M. D. Ewell, ib. 550; article on Impossibility of performance as a defence to actions *ex contractu*, by C. G. Tiedeman, 12 Cent. L. J. 4. Performance in case of death of promisor, see Siler v. Gray, 86 N. C. 566.

As to infectious disease, — here, smallpox, — among steamship passengers, excusing master from strict performance of contract to carry in a particular cabin, see *The Hammonia*, 10 Ben. 512.

(y) *Per* Willes, J., *Clifford v. Watts*, L. J. C. P. 297; *Millward v. Littlewood*, L. R. 5 C. P. 577, 585; 40 L. J. C. P. 5 Exch. 775; 20 L. J. Ex. 2. 36; *Hills v. Sughrue*, 15 M. & W. 253; (a) Bro. Abr. *Condition*, pl. 127; *Jones v. St. John's College*, L. R. 6 Holt, C. J., *Thornborow v. Whitacre*, 2 Q. B. 124; 40 L. J. Q. B. 80. Raym. 1164; *Hochster v. De la Tour*, 2 (z) *Wild v. Harris*, 7 C. B. 1005; 18 El. & Bl. 688.

of his covenant. (b) So where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, his plea was held insufficient. (c) It was there resolved that, "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" but "where the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, he ought to repair it." This has sometimes been construed to mean that the promisor is answerable in damages where the performance of his promise has become impossible by the act of God, and sometimes that he is answerable where performance has become not impossible, but only more burthensome. Where, in an action for breach of promise of marriage, the defendant pleaded that consummation had become impossible without danger to his life, it was held to be no answer to the action. (d) But where, after the making of the contract, performance has become impossible by the act of God, it would seem that the promisor is excused unless it

* clearly appears from the terms of the contract that [* 1197] the promisor was intended to be liable in all events.

Where a man, upon the marriage of his daughter, covenanted with her intended husband to give and bequeathe unto her, by deed or will, an equal share with his other children of the property he should die possessed of, and the daughter died in the lifetime of the covenantor, it was held that the liability upon this covenant was discharged by the death of the daughter, as performance had then become impossible by the act of God. (e) And where the occupier of a music hall agreed with the plaintiff that the plaintiff should have the use of the hall on certain days

(b) *Barker v. Hodgson*, 3 M. & S. 267.

(c) *Paradin v. Jane*, Aleyn, 26.

(d) *Hall v. Wright*, El. Bl. & El. 749; 27 L. J. Q. B. 345.

(e) *Jones v. How*, 9 C. B. 19; 7 Hare, 267; but see *In re Brookman's Trusts*, 38 L. J. Ch. 585.

for the purpose of giving concerts therein, and the plaintiff agreed to pay a certain sum *per diem* for the use of the hall, and before the first of the appointed days the hall was consumed by fire, it was held that both parties were discharged from the contract. (*f*) Where the plaintiffs contracted with the defendant to erect certain machinery upon his buildings and premises in his own occupation for a specified sum, and to keep the whole in order, under fair wear and tear, for two years, and when the machinery was only partly erected, a fire accidentally broke out in the buildings, and, without any fault by either party, destroyed both the buildings and the machinery then erected thereon, it was held that both parties were excused from the further performance of the contract, but that the plaintiffs were not entitled to recover anything in respect of any portion of the machinery which had been erected and destroyed, as the whole work contracted to be done by them had not been completed. (*g*) A contract to sell potatoes off a specific piece of land is a contract for a specific crop, although the crop is not then sown, and is subject to the implied condition that the defendant shall be excused if, before breach, performance becomes impossible by reason of a potato disease which no care of the defendant could prevent. (*h*) It has even been held that incapacity, by reason of the intervention of an act of God, to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve, absolute and unconditional in its terms, on the ground that the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract. (*i*) It has been said that it is an inaccurate expression * to say that the act of God excuses the breach of the contract, and that what is meant is that the breach is not within the contract. (*k*) If a man has

(*f*) *Taylor v. Caldwell*, 3 B. & S. 837; 33 L. J. Q. B. 164. 38 L. J. C. P. 1; and see *Robinson v. Davison*, L. R. 6 Ex. 269; 40 L. J. Ex.

(*g*) *Appleby v. Meyers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331. 172.

(*h*) *Howell v. Coupland*, 1 Q. B. D. 258. (*k*) *Hannen, J., Baily v. De Crespigny*, L. R. 4 Q. B. 185; 38 L. J. Q. B. 98.

(*i*) *Boast v. Firth*, L. R. 4 C. P. 1;

covenanted or agreed to do one of two things, and the performance of one of them is rendered impossible, he is not discharged from his liability to do the other. (*l*) A covenant in a lease of a coal mine or salt mine to raise and work so many tons of coal or salt a year, or to pay a certain minimum rent, is not discharged by proof that the mine is exhausted, and that there are no more coals or salt to work. (*m*) Performance is also excused where it has been rendered impossible by act and operation of law. (*n*) "Where H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed." (*o*) And where the defendant covenanted for himself and his assigns not to permit any messuage, &c., to be built on a certain piece of land which was afterward taken by a railway company under their compulsory powers and built upon, it was held that the defendant was not liable for the act of the railway company. (*p*) But the fact that a railway company have given the lessee a notice to treat does not absolve him from the obligation to perform his covenants down to the time of the execution of the conveyance to the company. (*q*) There is, indeed, nothing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law; but people in general must always be considered as contracting with reference to the law as existing at the time of the contract; and the words showing a contrary intention ought to be very clear to rebut that presumption. (*r*)

(*l*) *Barkworth v. Young*, 4 Drew. 24; 26 L. J. Ch. 153.

(*m*) *Bute v. Thompson*, 13 M. & W. 493; *Clark v. Glasgow Ass. Co.*, 1 Macq. H. L. C. 668.

(*n*) *Brown v. London (Mayor, &c.)* 30 L. J. C. P. 225; 31 ib. 280; 9 C. B. n. s. 726; 13 ib. 828.

(*o*) *Brewster v. Kitchell*, 1 Salk. 198; *Newington Local Board v. Cottingham Local Board*, 12 Ch. D. 725.

(*p*) *Baily v. De Crespigny*, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; *Slipper v. Tottenham Junction Ry. Co.*, L. R. 4 Eq. 112; *Newby v. Sharp*, 8 Ch. D. 39.

(*q*) *Mills v. East London Union*, L. R. 8 C. P. 79.

(*r*) *Maule, J., Mayor of Berwick v. Oswald*, 3 El. & Bl. 665; 23 L. J. Q. B. 324.

Payment and Acceptance of Part of an Admitted Simple Contract Debt¹ is not in general a satisfaction of such debt; (s) but if disputes exist as to the exact amount due, or the money be paid in advance, or some consideration be given and accepted, then the payment and acceptance of the smaller sum may [* 1199] be a * satisfaction and discharge of the claim for the larger amount; (t) and a creditor may agree to take less than the amount of his debt, provided payment is made by a particular day, and in default may recover the whole debt. (u) Composition deeds, moreover, form an exception to this rule. (x) Where money is paid and accepted as composition on a debt under a mistake of law, it is a discharge. (y) Payment and acceptance of part of an admitted debt may, under certain circumstances, be evidence of a gift of the remainder. (z)

Payment and Acceptance before Action of the Full Amount of an Admitted Simple Contract Debt is a satisfaction of the debt and of the nominal damages resulting from the detention or non-payment of the debt. (a) By the Bank Holidays Act, 1871, (b) no person can be compelled to make any payment upon the bank holidays thereby established, which he would not be compelled to make on Christmas Day or Good Friday; and the obligation to make such payment is postponed to the day following such bank holiday.

¹ Upon payment generally, see 2 Story, Contr. c. 66; 2 Pars. Contr. c. 3, sect. 1, p. 614; 7 Wait, Act. & D. c. 52; U. S. Dig. tit. *Payment*.

For the effect of part payment as a discharge of the whole debt, see U. S. Dig. tit. *Debtor and Creditor*, III.; Ann. Dig. 1870-78, tit. *Debtor and Creditor*; Ann. Dig. 1879, &c. tit. *Accord and Satisfaction*; 12 Cent. L. J. 81, note; 21 Am. L. Reg. 639, note.

(s) *Watters v. Smith*, 2 B. & Ad. 890; *Down v. Hatcher*, 10 Ad. & E. 121.

(t) *Cumber v. Wane*, 1 Smith's L. C. 291-293, 5th ed.; *Cooper v. Parker*, 14 C. B. 118; *post*, sect. 2, *Accord and Satisfaction*, p. * 1232.

(u) *Thompson v. Hudson*, L. R. 2 Ch. 255; 36 L. J. Ch. 388.

(x) *Post*, sect. 2, *Accord and Satisfaction*; *Pfleger v. Browne*, 28 Beav. 391.

(y) *Kitchin v. Hawkins*, L. R. 2 C. P. 22.

(z) *Bramston v. Robins*, 12 Moore, 80.

(a) *Beaumont v. Greathead*, 2 C. B. 500; *Triston v. Barrington*, 16 M. & W. 61; 16 L. J. Ex. 2; *Gell v. Burgess*, 7 C. B. 16; *Thame v. Boast*, 12 Q. B. 815.

(b) 34 Vict. c. 17, sect. 3; see also 38 Vict. c. 13.

Payment according to the Direction of the Creditor.—If a debtor is directed by his creditor to remit the amount of the debt by the post, the debtor is discharged by the delivery at the post-office of a letter containing the money addressed to the creditor at his usual place of residence. But the debtor is not discharged by the delivery of the letter to a bellman in the street, or by the transmission through the post of a letter addressed to the creditor at some large town, without any specification of the street or number of the house in which the latter resides, unless it be shown that the letter and money came safe to hand, or that the address was given by the creditor himself. (c) If a creditor desires his debtor to pay the amount of the debt to his (the creditor's) account at a particular banker's, the debt is discharged as soon as the payment has been made pursuant to the directions given; and if a creditor and debtor both keep an account with the same banker, and the amount of the debt is, at the request or with the assent of the creditor, transferred by the banker from the debtor's to the creditor's account, the transfer is equivalent to a payment, and the debt is extinguished. (d)

But a promise to * make a transfer of the credit from [* 1200] one account to the other is not equivalent to an actual transfer; and, therefore, where a debtor directed his banker to place a sum of money to the credit or to the account of the creditor at a future day, and the banker promised to do so, but became bankrupt before the time arrived, it was held that there was no payment and no extinguishment of the debt. (e)

Payment to a Person found in a Merchant's Counting-House, in possession of the merchant's account books, and apparently intrusted with the conduct of the business, is a good payment to the merchant himself, although the party receiving the money has in fact no authority from the merchant to receive it, and is not in his employment. (f) But where goods deposited with a warehouse-keeper were sold by the owner, and the warehouse-

(c) *Warwicke v. Noakes*, 1 Peake, 98; *Hawkins v. Rutt*, ib. 248.

(d) *Eyles v. Ellis*, 12 Moore, 306; 4 Bing. 112; *Bolton v. Richard*, 6 T. R. 139; *Bodenham v. Purchas*, 2 B. & Ald.

47.

(e) *Pedder v. Watt*, 2 Peake, 41.

(f) *Barrett v. Deere*, M. & M. 201; *Wilmott v. Smith*, ib. 238; 3 C. & P. 453; *Maule, J., Mitcheson v. Oliver*, 5 El. & Bl. 439.

keeper's clerk, after the sale, wrote without authority to the purchaser, and falsely represented that his employer, the warehouse-keeper, was authorized to receive the money on behalf of the vendor, and induced the purchaser by false statements to send a remittance by post, in a letter addressed to the warehouse-keeper, and the clerk got possession of the letter and absconded with the money, it was held that there had been no payment to the vendor. (*g*)

If a creditor requests his debtor to pay a sum of money on his (the creditor's) account to a third party, and the money is paid, this is equivalent to a payment to the creditor himself. (*h*) And if part of a money demand is paid in cash, and the residue is, by agreement, paid into the hands of a stakeholder or trustee to await the adjustment of certain differences, the payment is a good payment in satisfaction and discharge of the original cause of action. (*i*)

Payment by Bill or Note.¹ — Generally speaking, when a bill or note is taken in lieu of present payment of a debt, it is no more than giving an extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security, so that if the bill or note is not paid at maturity, the creditor may sue for his demand independently of the bill or note, just as if it had never been given. (*k*) But if the creditor has received the bill or note as cash, or if at the time of receiving it he has [** 1201*] agreed to take ** upon himself the risk of its being paid at maturity, or if the security is marred by the creditor's own laches in omitting to present it or give notice of its*

¹ See article on Payment in something else than money, 11 Cent. L. J. 360; *Morris v. Harveys*, 75 Va. 726; *Sayre v. King*, 17 W. Va. 562; *Re Parker*, 11 Fed. Reporter, 397. As to duty of a creditor who receives negotiable paper of a third person in payment, to present it and give notice of dishonor, see *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. Reporter, 538; see, further, U. S. Dig. tit. *Payment*, II.; Ann. Dig. tit. *Payment*.

(*g*) *Kaye v. Brett*, 19 L. J. Ex. 346; 5 Exch. 269.

(*h*) *Roper v. Bumford*, 3 Taunt. 76.

(*i*) *Page v. Meek*, 32 L. J. Q. B. 4; 3 B. & S. 259.

(*k*) *Sayer v. Wagstaff*, 5 Beav. 423; *Maillard v. Duke of Argyll*, 6 Sc. N. R. 938; *London, Birmingham, & South Staffordshire Bank, Limited, In re*, 34 L. J. Ch. 418.

dishonor, the bill becomes money in his hands as between himself and the person from whom he received it, (*l*) and the debt will be actually paid and discharged by the delivery and acceptance of the security. (*m*) If a creditor, after he has received a bill or note on account of a debt, sues for the debt, a plea by the debtor that a bill or note payable to a third person, or his order, or to bearer, or made by a third person, was given by him, or by a stranger, to the creditor, and was accepted by him for and on account of the debt, is a sufficient answer in the first instance to the action; and it is for the plaintiff to rebut the plea by showing that the bill was overdue and unpaid at the time of the commencement of the action, and that it remains dishonored in his possession or that of his agents. (*n*) And it is no answer that the debtor has been sued upon the bill, and that judgment has been obtained against him, if the judgment is unsatisfied and the creditor alone is entitled to put it in execution. (*o*) But in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt, and does not deprive the creditor of any lien he may have for the debt. (*p*) If the creditor of a firm in partnership takes the separate bill or note of one of the partners on account of the partnership debt due to him, his remedy against the firm will be suspended whilst the note is running; but the firm at large will not be discharged in case of the non-payment of the instrument when it arrives at maturity, unless it can be proved to have been given and received in satisfaction and discharge of the partnership debt, or unless there have been laches or neglect on the part of the creditor or holder in not using the due and customary means of obtaining payment, and the partnership has consequently been prejudiced thereby. (*q*) If a joint bill or note

(*l*) *Peacock v. Pursell*, 14 C. B. n. s. 728; 32 L. J. C. P. 266.

(*m*) *Sard v. Rhodes*, 1 M. & W. 155; *Guard. Lich. Un. v. Greene*, 1 H. & N. 889; 26 L. J. Ex. 140; *Caine v. Coulton*, 1 H. & C. 768; 32 L. J. Ex. 97; 3 & 4 Anne, c. 9, sect. 7.

(*n*) *Belshaw v. Bush*, 11 C. B. 201; 22 L. J. C. P. 24; *Simon v. Lloyd*, 2 C. M. & R. 189; *James v. Williams*, 13

M. & W. 833; *Mercer v. Cheese*, 5 Sc. N. R. 664; *Maillard v. Duke of Argyll*, 6 ib. 938; *Price v. Price*, 16 M. & W. 241; *Fearn v. Cochrane*, 4 O. B. 285.

(*o*) *Tarleton v. Allhusen*, 2 Ad. & E. 32.

(*p*) *London, Birmingham, & South Staffordshire Bank, In re*, 34 Beav. 332; 34 L. J. Ch. 418.

(*q*) *Bedford v. Deakin*, 2 B. & Ald.

of the firm at large is accepted by the creditor on account of his debt, and the holder, instead of obtaining payment when the bill becomes due, elects to take the separate bill of one of the partners alone, this may be evidence of an agreement on [* 1202] his part to take * the sole and separate security of the one partner in satisfaction and discharge of the partnership debt; (r) "for many cases may be conceived where the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy." (s) If payment is to be made by "approved bills," and the debtor, without indorsing it, hands to the creditor a bill which "is approved," the payment is conditional only; and if the bill is dishonored, the debtor will be liable to the same extent as if he had indorsed it, but to that extent only, and will be discharged if he does not receive due notice of dishonor. (t)

Acceptance of Renewed Bills. — Where an action was brought upon a bill of exchange, and it was agreed between the parties that the action should be stayed, and that the defendants should pay the costs, renew the bill, and give a warrant of attorney to secure the debt, and the defendants renewed the bill and gave the warrant of attorney, but did not pay the costs, it was held that the plaintiff might bring a fresh action upon the first bill while the second was outstanding in the hands of an indorsee. (u) But where a bill was dishonored, and the debtor gave the creditor another bill, and a warrant of attorney to confess judgment in case of the non-payment of the second bill, and agreed to pay the expenses of the execution of the warrant of attorney, and the second bill was duly honored, but those expenses were not paid, it was held that the creditor could not sue the debtor upon the original bill for the purpose of recovering those expenses, as

217. In these cases there is the joint liability of the whole firm in case of non-payment, in addition to the separate liability of the single partner on the bill. *Bottomley v. Nuttall*, 5 C. B. N. S. 144; 28 L. J. C. P. 110.

(r) *Evans v. Drummond*, 4 Esp. 91; *Reed v. White*, 5 Esp. 122.

(s) *Thompson v. Percival*, 5 B. & Ad. 932; *Lyth v. Ault*, 21 L. J. Ex. 217.

(t) *Smith v. Mercer*, L. R. 2 Ex. 51; 37 L. J. Ex. 24.

(u) *Norris v. Aylett*, 2 Campb. 328.

the payment of the second bill operated as a discharge of the first, but that they might be recovered as money paid by the creditor for the use of the debtor. (*x*) If a renewed bill is taken in exchange for a former bill, no action can be maintained upon the first bill until the second bill becomes due and has been dishonored and returned, (*y*) unless the second bill does not extend to and cover the interest that had accrued due on the first bill at the time such second bill was given, in which case the giving of the second bill does not preclude the creditor from suing upon the first bill for the recovery of such interest. (*z*)

Actions for Debts secured by Dishonored Bills or Notes.—When a plaintiff sues for a debt for which a dishonored bill or note has been given, he must be prepared to show that the instrument is in his possession or under his control, and not outstanding * in the hands of an indorsee or [* 1203] any party entitled to sue upon it; (*a*) but where, at the request of the creditor, the debtor delivers a promissory note on account of the debt to third persons, as trustees for the creditor, and the debtor knows at the time that these persons are such trustees, the fact that the note is still in their hands is no answer to an action by the creditor for the recovery of his original debt when the note is due and unpaid. (*b*) He must, also, if the bill or note is made or accepted by some third party, and is indorsed by the debtor himself, show that it was presented for payment at the time it became due, and that it was dishonored; (*c*) but if the debtor's name does not appear upon the face of the bill, the creditor is not bound to prove that he gave notice of dishonor, either to the drawer or the debtor. (*d*) The keeping of the security an unreasonable time without presenting it for payment has been held to be evidence that the creditor accepted it by way of payment in satisfaction and discharge of the

(*x*) *Dillon v. Rimmer*, 7 Moore, 431.

(*y*) *Kendrick v. Lomax*, 2 C. & J. 405.

(*z*) *Lumley v. Musgrave*, 4 Bing. N. C. 9.

(*a*) *Hadwen v. Mendizabel*, 10 Moore, 477; 2 C. & P. 20; *Burden v. Halton*, 1 M. & P. 223; 4 Bing. 454; *Price v. Price*, 16 M. & W. 243.

(*b*) *National Savings Bk. Association v. Tranah*, 36 L. J. C. P. 260; L. R. 2 C. P. 556.

(*c*) *Peacock v. Pursell*, 32 L. J. C. P. 266; 14 C. B. N. S. 728.

(*d*) *Goodwin v. Coates*, 1 Mood. & Rob. 221; *Swinyard v. Bowes*, 5 M. & S. 62; *Bishop v. Rowe*, 3 M. & S. 368.

debt. (e) The delivery and receipt of a negotiable instrument on account of a debt is payment by the 3 & 4 Anne, c. 9, sect. 7, if the person accepting it does not take his due course to obtain payment thereof by endeavoring to get it accepted and paid. (f) If the bill or note is duly honored at maturity, the payment dates from the time the money due on it was paid, and not from the time the bill or note was originally given, unless there be circumstances to show that the delivery and acceptance of the security were regarded by the parties as actual payment. (g) Fraudulent and invalid bills and notes may in general be considered as waste paper; and the creditor may resort at once to his original demand. (h)

Payment by Cheque. — The production of a cheque drawn by the defendant on his bankers, having the plaintiff's name or signature in his own handwriting, or that of his agent, on the cheque, is *prima facie* evidence of payment. (i) The circumstance, also, of a cheque having been made payable to the defendant, and of the defendant having received the amount of the cheque, is proof of payment. (k) If the debtor makes an order upon his banker for payment of the amount of [* 1204] the debt, and * the creditor accepts it, and keeps it in his hands an unreasonable time before presenting it for payment, and the banker becomes insolvent, the debtor is discharged on account of the laches of the creditor. It is difficult to say what is an unreasonable time; and probably each case must depend more or less on its own circumstances. In one case four months, (l) and in another three weeks, (m) were held to be an unreasonable time for a draft, cheque, or order on a banker to be retained without presentment in the hands of the creditor. If the creditor, on presenting the draft or order to the banker or person on whom it is made, has the

(e) Griffith v. Pope, cited Andr. 189.

(f) Price v. Price, 16 L. J. Ex. 99.

(g) *In re Harries*, 13 M. & W. 3.

(h) Earl of Bristol v. Wilshire, 1 B. & C. 514; 2 D. & R. 755; Tindal, C. J., Maillard v. Duke of Argyll, 6 Sc. N. R. 945; Wilson v. Vysar, 4 Taunt. 288; Cundy v. Marriott, 1 B. & Ad. 696.

(i) Egg v. Barnett, 3 Esp. 197.

(k) Mountford v. Harper, 16 L. J. Ex.

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(l) Chamberlyn v. Delarive, 2 Wils. 353; Smith v. Wilson, Andr. 190.

(m) Hopkins v. Ware, L. R. 4 Ex. 265; 38 L. J. Ex. 147.

opportunity of receiving a cash payment, and for his own convenience, or the convenience of the drawee, elects to take a note or bill for the amount, the original debt is discharged. (*n*)

A payment good by the law of the country where it is made is good here. (*o*) If parties meet together and state an account, and various pecuniary claims are made and allowed on both sides, and a balance is struck and paid over, and the account settled, the allowances in account are, in contemplation of law, payments. (*p*) But this is not the case where the items are all on one side. (*q*)

Payment by a Stolen Bank Note.¹ — A bank note payable to bearer, and transferable by delivery, is considered as money, so that every person who takes it by way of payment of a debt, in the ordinary course of business, has a good title to it, and his right to enforce payment of it is unaffected by any infirmity of title in the person who delivered it to him. (*r*) If, therefore, a tradesman gives change for a stolen note in ignorance that the note has been stolen, and then pays the note to a creditor in discharge of a debt, the payment is a good payment, the creditor having a valid title to the note, and being able to enforce the security against the banker who has issued it. (*s*)

Payment by a Stranger. — Where one makes a payment in the name and on behalf of another without authority, it is competent for the debtor to adopt and ratify the payment, (*t*) even after the creditor has commenced an action for the debt; (*u*) but where * the payment is not made by [*1205] way of gift for the benefit of the debtor, but by a

¹ As to payment in notes of a bank which is insolvent, see *Ontario Bank v. Lightbody*, 13 Wend. 101, and 21 Am. Dec. 188, note.

(*n*) *Post*, p. *1209.

(*o*) *Ralli v. Dennistoun*, 6 Exch. 483.

(*p*) *Callander v. Howard*, 10 C. B. 290; 19 L. J. C. P. 312; *Holland v. Russell*, 30 L. J. Q. B. 313; 1 B. & S. 424.

(*q*) *Perry v. Attwood*, 25 L. J. Q. B. 408.

(*r*) *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J. C. P. 33; and see *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J. Ex. 13.

(*s*) *Miller v. Race*, 1 Burr. 452; 1

Smith's L. C. 450, 5th ed.; *Grant v. Vaughan*, 3 Burr. 1516.

(*t*) *Co. Litt.* 206 b; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J. C. P. 24; *Cork v. Lister*, 13 C. B. n. s. 543, 594; 32 L. J. C. P. 121, 126; *Inst. lib.* 3, tit. 29, 1.

(*u*) *Simpson v. Eggington*, 10 Exch. 845; 24 L. J. Ex. 312.

person who intended that he should be reimbursed by the debtor, but who had not the debtor's authority to pay, it is competent for the creditor and the person paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the effect of payment is at an end, and the debtor remains responsible. (x)

Proof of Payment. — Where the plaintiff's attorney wrote to the defendant, requesting him to remit the balance due to the plaintiff with 13s. 4d. costs, and the defendant sent a bank bill for the amount of the debt only, which the plaintiff's attorney by letter refused to receive, but nevertheless retained, it was held that the facts constituted evidence of payment, and that the attorney had no right to keep the bank bill and then proceed as if he had never received it. (y) Where, however, there was a request to remit, and a post-office order was sent which was not available because a mistake had been made in the name of the payee, it was held that there was no evidence of payment, although the order had been retained by the latter; (z) and where the defendant sent the plaintiff a cheque which purported to be drawn for the balance of the plaintiff's account, and would consequently, if presented by him, have been tantamount to the giving a receipt in full for all demands, and the plaintiff by letter declined to receive the cheque as a payment of all that was due, and expressed his willingness to return it, but retained it in his hand, it was held that there was no evidence of payment. (a)

Presumption of Payment. — Any great lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords a *prima facie* presumption that payment has been made. (b) Where servants are in the habit of being paid weekly or monthly, and supporting themselves by their week's or month's wages, the presumption is in favor of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any

(x) *Walter v. James*, L. R. 6 Ex. 124; 40 L. J. Ex. 104.

(y) *Caine v. Coulton*, 1 H. & C. 768; 32 L. J. Ex. 97.

(z) *Gordon v. Strange*, 1 Exch. 477.

(a) *Hough v. May*, 4 Ad. & E. 954.

(b) *Cooper v. Turner*, 2 Stark. 497.

demand of payment on the part of the servant, or any admission or acknowledgment on the part of the employer of arrears being due. (c) A general receipt on the back of a bill of exchange is no evidence of payment of the bill by the acceptor. The receipt of itself shows nothing until it is explained. (d) But when bills proved to have been once in circulation after

* having been accepted, get back again into the hands [* 1206] of the acceptor, and are produced by him, the presumption is that he has got them back by having paid them. Receipts on the bills, to be evidence of payment, must be shown to be in the handwriting of the defendant, or of some other person authorized to receive payment of the bills. (e)

Receipt. — A receipt is nothing more than a *prima facie* acknowledgment that money has been paid, and may be contradicted or explained. (f)

Payment to an Agent in the Ordinary Course of Business is a payment to the principal, unless the latter has countermanded the agent's authority, and given the proper notice to the defendant before the payment was made. Payment to the solicitor of a plaintiff in an action is a payment to the plaintiff himself, but not a payment to an agent of the solicitor. (g) An agent employed to sell an estate has no implied authority to receive the purchase-money; (h) nor has a solicitor who has possession of a mortgage deed signed by the mortgagor. (i) And an authority to receive the interest of a sum of money, invested on mortgage or other real or personal security, does not carry with it any authority to receive the principal, unless the party receiving the interest was himself previously intrusted with possession of the principal, and has himself invested it, and dealt with it in pursuit of the ordinary trade or calling of a scrivener or money-lender. If a scrivener lends another's money in his own name, payment to him is a good payment; and if, being intrusted with

(c) *Lucas v. Novosilieski*, 1 Esp. 295. *Lancashire & Yorkshire Ry. Co., L. R.*

(d) *Phillips v. Warren*, 14 M. & W. 6 Ch. 527.

380.

(g) *Yates v. Frickleton*, 2 Doug. 623.

(e) *Pfiel v. Vanbatenberg*, 2 Campb.

(h) *Mynn v. Joliffe*, 1 Mood. & Rob.

439.

327.

(f) *Skaife v. Jackson*, 3 B. & C. 421 ;

(i) *Ex parte Swinbanks*, 11 Ch. D.

Graves v. Key, 3 B. & Ad. 313 ; *Lee v.* 525.

the money, he lends it in the name of his client on the security of a bond, and holds the bond in his hands, he is dealing with the money in the way of his trade, and a receipt of it by him is a receipt by his principal. But a scrivener or money-lender who lends out another man's money on mortgage, and holds the mortgage deeds, has no implied authority to receive the principal after the day appointed for payment by the ordinary condition of defeasance has passed. He has himself no power to re-convey the estate, and cannot release the mortgage debt. (*k*)

Mode of Payment to Agents.—A money payment is, in the absence of any custom of the trade to the contrary, the only authorized mode of payment, as between commission-agents for sale and the purchasers with whom they deal; (*l*) and, [* 1207] therefore, * if a person buys goods of an agent, knowing him to be an agent, and knowing who the principal is, he cannot, by paying the agent in goods, discharge himself from liability for the price to the principal, without ascertaining whether such a course of dealing has been authorized by the latter. (*m*) So if a person buys goods of another, having notice that he is an agent and not a principal, though he does not know who the principal is, he cannot set off a debt due to him from such agent, in an action by the principal for the price of the goods. (*n*) Where an agent employed by a coal-merchant to sell coals, made a bargain with a tailor to furnish the latter with coals in return for clothes, and the coals when sent in were accompanied by a ticket, in which the coal-merchant's name was inserted as the vendor of the coals, it was held that the tailor, after he had received such a ticket, giving notice who the real owner was, ought to have ascertained whether the course of dealing was sanctioned by the latter, and that, not having done so, he could not set up the delivery of clothes to the agent as an answer to the coal-merchant's action for the price of the coals. (*o*)

(*k*) *Wilkinson v. Candlish*, 5 Exch. 91; 19 L. J. Ex. 166.

(*l*) *Barker v. Greenwood*, 2 Y. & C. Ex. 414, 419; *Sweeting v. Pearce*, 7 C. B. n. s. 485; 29 L. J. C. P. 272.

(*m*) *Capel v. Thornton*, 3 C. & P. 352; *Howard v. Chapman*, 4 C. & P. 508.

(*n*) *Semenza v. Brinsley*, 34 L. J. C. P. 161; *Dresser v. Norwood*, 17 C. B. n. s. 466; 34 L. J. C. P. 48; see *Ex parte Dixon*, 4 Ch. D. 133.

(*o*) *Pratt v. Willey*, 2 C. & P. 350; *Cornish v. Abington*, 4 H. & N. 555.

Payment by delivery of a bill of exchange to the agent is not a valid payment to the principal, unless the agent was expressly authorized to receive payment by bill, or unless such payment was in accordance with the usual and customary course of business, or has been assented to and adopted by the principal. (*p*) But payment by a cheque which is duly honored is a good payment. (*q*) "The general rule of law is that, if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged." (*r*) Thus where the known agent of a wine-merchant sold wine to a customer, who paid for it by returning to the agent his own cheque, which the customer had cashed a few days previously, it was held that this was not, as between the principal and the customer, a payment for the wine sold to the latter through the medium of the agent. (*s*) A solicitor as agent gave to a stockbroker directions to sell stock, and the stockbroker sent him a cheque for part of the purchase-money, and carried the balance to the solicitor's credit in the account * between them, which account was [* 1208] afterward settled; it was held that the stockbroker must have had notice that the solicitor was an agent, and that carrying the balance to the credit of the solicitor's account was not a payment. (*t*)

An assurance broker, as agent of the assured, is, in general, only entitled to receive payment for the assured from the underwriter in money. (*u*) But where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of the business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors,

(*p*) *Ward v. Evans*, 2 Ld. Raym. 930; *Williams v. Evans*, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

(*q*) *Bridge v. Garrett*, L. R. 5 C. P. 451.

(*r*) *Russell v. Bangley*, 4 B. & Ald. 398.

(*s*) *Underwood v. Nicholls*, 17 C. B. 239; 25 L. J. C. P. 79.

(*t*) *Pearson v. Scott*, 9 Ch. D. 198.

(*u*) *Todd v. Reid*, 4 B. & Ald. 210; *Wall v. Cockerell*, 10 H. L. C. 229; but see *Catterall v. Hindle*, L. R. 2 C. P. 368; 35 L. J. Q. B. 161.

with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that, where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention and with the authority of the principal. (x)

When money has been paid to an agent to be transmitted to his principal, or to be placed to the credit of the latter in his account with his agent, the party paying the money loses all control over it as soon as it reaches the hands of the agent. (y)

Payment to a Creditor of the Creditor. — Payment by a garnishee, on execution levied upon him in accordance with the Common Law Procedure Act, 1854, is a valid discharge to the garnishee, as against the judgment debtor, to the amount paid or levied, although the proceedings may be set aside or the judgment reversed. (z) But to discharge the garnishee there must be a judge's order for payment; payment upon notice of attachment only is no discharge. (a) The order of attachment does not conclusively vest the debt in the judgment creditor as against the trustee of the judgment debtor, if the latter is adjudicated a bankrupt before the order is made absolute, and, therefore, in such a case the garnishee should show cause against the order being made absolute. (b) But if the order is made absolute, and payment is made under it without notice of the adjudication, the payment is a good discharge. (c) Whether it is equally a discharge where there has been notice of the adjudication [* 1209] after the * order was made absolute, and in sufficient time to enable the garnishee to apply for a stay of execution, is unsettled. In such a case the safer course for the garnishee is either to apply for a stay of execution, or to give the trustee notice of the order informing him that it would be obeyed unless the trustee got the order set aside. (d) If the

(x) *Stewart v. Aberdeen*, 4 M. & W. 211; *Catterall v. Hindle*, L. R. 2 C. P. 368. (b) *Holmes v. Tutton*, 5 E. & B. 15; 24 L. J. Q. B. 346.
 (y) *Williams v. Deacon*, 4 Exch. 497. (c) *Wood v. Dunne*, L. R. 2 Q. B. 73.
 (z) 17 & 18 Vict. c. 125, sect. 65. (d) *Wood v. Dunne*, *supra*.
 (a) *Turner v. Jones*, 1 H. & N. 878; 26 L. J. Ex. 262.

trustee waives his claim, the garnishee has no independent right to resist payment to the judgment creditor. (*e*)

Payment by an Agent.—If the principal has authorized the agent to pledge his, the principal's, credit in the commercial world, and the principal is consequently disclosed and debited in the first instance, he at once becomes responsible upon the contract, and continues liable until the creditor has received actual payment, or has taken security from the agent, having had an option of a cash payment from the latter at the time he did so. If the principal furnishes the agent with money to pay the debt, and the agent, instead of making a cash payment, gives the creditor a bill of exchange or promissory note, or a cheque on a banker, and the security fails or is dishonored, the principal is not discharged, unless it appears that the creditor knew that he might have had cash, but preferred a bill for his own accommodation. If, having had the option of receiving money, he nevertheless thinks fit to take the acceptance of the agent, he is deemed to have accepted the credit and responsibility of the latter, in lieu of that of the principal, and to have discharged the principal. (*f*) If the agent pays by a cheque of his own, the creditor, if he accepts it, must present it for payment within a reasonable time; and if he fails to do so, and by his delay alters for the worse the position of the debtor, the latter is discharged. (*g*) And if he gives his receipt to the agent as for a cash payment, when he has only obtained a bill, and the principal pays money to the agent, and alters the state of his accounts with the latter to his, the principal's, own prejudice, upon the supposition that the demand has been satisfied as the receipt imports, the creditor cannot afterward, in case of the insolvency of the agent, and the failure of the security he has taken from the latter, resort to the principal for payment. (*h*)

If, on the other hand, the principal is not known or disclosed

(*e*) *European Bank v. Fox*, L. R. 2 Q. B. 85, note. Noel, 3 Campb. 411; *Everett v. Collins*, 2 Campb. 515; *Anderson v. Hillies*, 12

(*f*) *Marsh v. Pedder*, 4 Campb. 257; C. B. 504.

Strong v. Hart, 9 D. & R. 192; 6 B. & C. 160; *Smith v. Ferrand*, ib. 803; (*g*) *Hopkins v. Wave*, L. R. 4 Ex. 268; 28 L. J. Ex. 147.

Tapley v. Martens, 8 T. R. 453; *Robinson v. Read*, 9 B. & C. 449; *Clarke v.* (*h*) *Wyatt v. Hertford*, 3 East, 147.

at the time of the making of the contract, if the agent [* 1210] deals in his *own name, and is debited accordingly, and the principal, in ignorance of the intention of the creditor to look to him for payment, and being misled by the conduct of the creditor, has furnished the agent with funds for the liquidation of the debt, he is thenceforth discharged, and the creditor cannot afterward, if the agent dies or becomes insolvent with the money in his hands, resort to the principal for payment. (i) The mere circumstance of the agent's being indebted to the principal at the time of his insolvency, or of his having a balance in hand out of which he might have paid the debt, is not of itself sufficient to discharge the principal. (k)

Payment to One of Several Partners in trade is a payment to the firm at large, although the partnership have appointed a collector to get in the partnership debts, and the payment was made with notice of such appointment. (l) It is also within the scope and authority of one partner, even after a dissolution of partnership, to receive and give a discharge for a debt owing to the firm. (m) But a partner cannot set off his separate debts against the debts due to the firm. (n) But payment by a banker or depository of a sum of money deposited in his hands by several persons jointly to one of the joint depositors, without the express authority of the others, is not a valid payment as against them.

Payments to Trustees, Executors, &c. — Payment to one of two trustees acting in the execution of a trust, is a payment to both, unless the payment be a payment as between banker and customer. (o) It is part of the law merchant that bankers shall not pay to one of several persons jointly interested without the consent of the others except by express agreement. Therefore if two persons give a power of attorney to bankers to sell out their joint stock, the bankers must place the proceeds to the joint account of the two, and both must concur in drawing out the

(i) *Heald v. Kenworthy*, 10 Exch. 739; 24 L. J. Ex. 76; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253, as explained by *Irvine v. Watson*, 5 Q. B. D. 414, C. A.

(k) *Waring v. Favenck*, 1 Campb. 85.

(l) *Porter v. Taylor*, 6 M. & S. 156.

(m) *Nottidge v. Prichard*, 2 Cl. & F. 379; 8 Bli. n. s. 493.

(n) *Piercy v. Fynney*, L. R. 12 Eq. 69.

(o) *Husband v. Davis*, 10 C. B. 645; 20 L. J. C. P. 118; *Wallace v. Kelsall*.

7 M. & W. 272.

money. If it is meant that the money should be paid to one, an authority ought to be given to that effect by the other to the bankers; (*p*) and if money is paid into a bank by three persons not partners, one of them cannot draw cheques without the concurrence or authority of the others, as it would defeat the object of paying in the money jointly. (*q*) Payment to one of several executors of a debt due to their testator is a good payment as * against the others; for each executor has [*1211] authority under the will to collect and receive debts due to the estate independently of his co-executors. (*r*) Payment to a person who has obtained probate of a forged will is a discharge to the party so paying from farther liability, although the probate be afterward declared null, and administration be granted to the intestate's next of kin; for the debtor cannot controvert the authority of the probate so long as it remains unrepealed. (*s*) Payment, also, to an administrator before the will is found, is a good defence to an action subsequently brought by an executor. (*t*) Payment, also, to one of several assignees of a bankrupt's estate of a debt due to the bankrupt is a valid payment to the assignees generally, (*u*) unless the other assignees have expressed their dissent, and interfered to prevent the payment. (*x*)

Payments made to a Bankrupt. — By the Bankruptcy Act of 1869 nothing therein contained is to render invalid any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. (*y*)

Appropriation of Payments.¹ — The general rule of law is that the party who pays money has a right to apply that payment as

¹ Munger, *Application of Payments* (1879), is a valuable monograph on the subject. See also 2 Story, *Contr.* c. 50; 2 Pars. *Contr.* 629; U. S. Dig. tit. *Payment*, III.; Ann. Dig. tit. *Payment*; *Applegate v. Koons*, 74 Ind. 247.

(*p*) *Stone v. Marsh*, R. & M. 369.

(*t*) *Pond v. Underwood*, 2 Ld. Raym.

(*q*) *Innes v. Stephenson*, 1 Mood. & 1210.

Rob. 147.

(*u*) *Smith v. Jamesons*, 1 Esp. 114.

(*r*) *Can v. Read*, 3 Atk. 695.

(*x*) *Bristow v. Eastman*, ib. 174.

(*s*) *Allen v. Dundas*, 3 T. R. 125.

(*y*) 32 & 33 Vict. c. 71, sect. 94.

he thinks fit. (z) If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. (a) If, therefore, money becomes due on a bond, and a debt is also owing for goods sold and delivered, and the debtor makes a payment, declaring it to be on account of the bond debt, the creditor cannot appropriate it to the simple contract debt. But if the payment be made generally on account, the creditor may appropriate it to whichever debt he pleases. (b) Where two debts were due to the plaintiff, one on a covenant, and the other on a simple contract debt, it was held that he might appropriate payments made generally on account to the simple contract debt. (c) And where a creditor had received money without any specific [* 1212] appropriation * by the debtor, he was permitted to appropriate it to the discharge of a purely equitable debt. (d) The appropriation by the creditor may be made at any time before the case comes under the consideration of a jury; and he is not bound at the time he makes the appropriation to give the debtor any notice thereof. (e) If, however, he communicates his election to the debtor, he is bound thereby, and cannot make a different appropriation without the assent of the debtor.

In the Roman law, if no appropriation was made either by the debtor or the creditor at the time of payment, the payment was appropriated to the most burthensome debt, and no different appropriation could be afterward made; (f) and this rule of the civil law has been adopted and acted upon by our Court of Chancery. (g) But by the common law, it was held that the

(z) As to the application of the maxim, "solutio accipitur in modum solventis," see *Croft v. Lumley*, 6 H. L. C. 705; 27 L. J. Q. B. 334.

(a) *Simson v. Ingham*, 2 B. & C. 72; Dig. lib. 46, tit. 3, l. 1, 3; *Hooper v. Keay*, 1 Q. B. D. 178.

(b) *Anon.*, Cro. Eliz. 68; *Clayton's case*, 1 Mer. 585; *Kinnaird v. Webster*, 10 Ch. D. 139.

(c) *Peters v. Anderson*, 5 Taunt. 596.

(d) *Bosanquet v. Wray*, 6 Taunt. 597.

(e) *Philpott v. Jones*, 2 Ad. & E. 44.

(f) Dig. lib. 46, tit. 3, l. 35.

(g) *Anon.*, 12 Mod. 559; *Merriman v. Ward*, 1 Johns. & H. 371; *Devaynes v. Noble*, Tudor's Lead. Cas. Merc. Law, 1.

payment would not be so appropriated, without some circumstances to show that it was so intended. (*h*)

What amounts to an Appropriation by the Debtor. — If there are several debts due, and application is made by the creditor for one of these in particular, the payment made in answer to the application is obviously made on account of the specific debt named, and cannot be appropriated by the creditor to a different debt. (*i*) If a bill of exchange becomes due, and the exact amount of the bill is paid by the party liable, the payment is deemed to have been made on account of the bill. (*k*) If goods are sold and delivered on credit for a certain sum, and the exact amount of the purchase-money is subsequently paid, the irresistible presumption is, that the payment was a payment of the price of the goods. (*l*) Where money is paid as an instalment of a composition in respect of several debts, it must be appropriated to those debts ratably. (*m*)

Appropriation by the Creditor. — If there be one debt due on a lawful contract, and another debt arising out of an illegal transaction, the creditor cannot appropriate the payment to the unlawful demand so as to enable him to sue for the lawful debt; (*n*) but if the contract creating the debt is not absolutely unlawful, the creditor being merely prevented from suing upon it by some statutory enactment framed for the purpose of protecting the debtor from particular actions and suits, then the creditor * may appropriate the payment to [* 1213] the demand the right of action for which is barred by the statute, and sue for the other debt. Such is the case when the right of action for one of two debts is barred by the statute of limitations, or by the acts regulating the sale of spirituous liquors on credit. (*o*) Where a solicitor had several claims against a corporation for work and services and money paid, some of which he could enforce by action against the body corporate,

(*h*) *Plomer v. Long*, 1 Stark. 154.

(*i*) *Shaw v. Picton*, 4 B. & C. 715.

(*k*) *Newmarch v. Clay*, 14 East, 244.

(*l*) *Marryatts v. White*, 2 Stark. 102.

(*m*) *Thompson v. Hudson*, L. R. 6

Ch. 320; *In re Accidental Death Ins.*

Co., 7 Ch. D. 568.

(*n*) *Wright v. Laing*, 3 B. & C. 165.

(*o*) *Mills v. Fowkes*, 7 Sc. 444; 5

Bing. N. C. 461; *Williams v. Griffith*,

5 M. & W. 300; *Cruickshanks v. Rose*, 1

Mood. & Rob. 100; *Philpott v. Jones*, 2

Ad. & E. 41.

and some of which he was precluded from enforcing by reason of a technical defect in his appointment, it was held that he might appropriate a general payment to the latter claims, and proceed for the recovery of those debts which the law permitted him to enforce. (*p*) But where a solicitor delivered a bill containing taxable items and charges not taxable, and a general payment was made on account, it was held that the attorney could not appropriate the payment to the taxable items, so as to enable him to sue for the other charges, without delivering a signed bill pursuant to the statute. (*q*) And where the directors of a company had carried on business unauthorized by the deed of settlement, and money had been paid by the company to their solicitors on account of costs generally, it was held that the solicitors had no right, at any rate *post litem motam*, to appropriate the payment to the costs incurred in respect of the unauthorized business. (*r*)

If there be a debt due from the debtor in a representative character, and another in his own right, a general payment on account is deemed to be a payment of the debt due from the debtor in his own right, and the creditor cannot, without the express assent or direction of such debtor, appropriate it in discharge of a debt due from him as executor or administrator. (*s*) And where there are distinct demands, one against persons in partnership and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; for that would be allowing the creditor to pay the debt of one person with the money of others. (*t*) If there be a legal debt, and a claim which would only become a legal debt on a settlement of partnership accounts and striking a balance, a general payment is applicable only to the legal debt. It cannot be appropriated to the unsettled partnership account, so as to enable the creditor to sue for the undisputed debt. (*u*)

(*p*) *Arnold v. Mayor of Poole*, 5 Sc. N. R. 741.

(*q*) *James v. Child*, 2 Cr. & J. 678.

(*r*) *Phoenix Life Assurance Co., In re*, *ex parte Howard*, 1 H. & M. 433.

(*s*) *Goddard v. Cox*, 2 Str. 1194.

(*t*) *Thompson v. Brown*, M. & M. 41.

(*u*) *Goddard v. Hodges*, 1 Cr. M. 39.

*** Separate Accounts and One Entire Running Ac- [* 1214]**
count. — Where there are distinct accounts and a general payment, and no appropriation by the debtor at the time of payment, the creditor may apply the payment to which account he pleases; but where a variety of transactions are included in one general account, the items of credit are, in the absence of other appropriation, to be appropriated to the items of debit in order of date. (x) This presumption, however, may be rebutted by an express stipulation or by a particular mode of dealing between the parties, (y) or by the circumstances of the case showing that this could not have been their intention. (z) Where there is a secured debt and an unsecured debt, any payment is to be appropriated first to the secured debt. (a) “Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account.” (b) But if the account is not treated as one entire running account, but is divided into separate and distinct accounts, the payments are not necessarily appropriated to the earlier items. (c)

Avoidance of Payment. — A payment good at the time as extinguishing the debt may be rendered void by matter subsequent, as, in the event of the bankruptcy of the debtor, by the election by his trustee to treat the payment as a fraudulent preference. (d) The Bankruptcy Act of 1869, (e) does not avoid as a fraudulent preference an act which was not so under the old law, (f) and

(x) Clayton's case, 1 Mer. 608; Bodenham v. Purchas, 2 B. & Ald. 39.

(y) Henniker v. Wigg, 4 Q. B. 795; Williams v. Rawlinson, 10 Moo. 371.

(z) City Discount Co. v. MacLean, L. R. 9 C. P. 692.

(a) Kinnaird v. Webster, 10 Ch. D. 139

(b) Bayley, J., 2 B. & C. 72; Bodenham v. Purchas, 2 B. & Ald. 46; Simson

v. Ingham, *infra*; Hooper v. Keay, 1 Q. B. D. 178.

(c) Simson v. Ingham, 2 B. & C. 65.

(d) *Per* Willes, J., Newington v. Levy, L. R. 5 C. P. 607, 612; 39 L. J. C. P. 334; see same case in Ex. Ch. 6 L. R. 180; 40 L. J. C. P. 29.

(e) See sect. 92.

(f) *Ex parte* Tempest, in re Craven and Marshall, L. R. 6 Ch. 70.

in order, therefore, to constitute a fraudulent preference, the act must be the spontaneous act of the debtor, not *bona fide* originating in a demand or some other step of the creditor, and it must be in contemplation of bankruptcy; (g) but where a man is in such a hopeless state of insolvency as that it is impossible for him to satisfy his creditors or to carry on his business, he is to be held to contemplate bankruptcy. A payment, however, in the ordinary course of trade, such as honoring bills [* 1215] of exchange * presented at maturity, or paying debts which have become due in the usual and customary manner, or a payment made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, is not open to objection on the ground of being voluntary, although made without any express demand by the creditor, unless the creditor had at the time notice of an act of bankruptcy committed by the debtor. (h)

Tender of Payment.¹—Bank of England notes are a good tender for all sums above £5, so long as the Bank of England continues to pay its notes on demand in legal coin; but neither the bank, nor any branch bank, can make a legal tender of payment in its own notes to a party requiring gold. (i) Gold coin is a good tender for payment of any amount. Silver coin is a good tender for sums not exceeding 40s., and bronze coin for sums under 6d. (k) But no valid tender can be made of gold, silver, or bronze coin defaced by names or words stamped thereon, or bent by any machine or instrument. (l) If an absolute and unconditional covenant or promise be made for the payment of money, without any time of payment being mentioned, there is an immediate liability and cause of action, in respect of which a writ may be at once issued. Every plea of tender, being pleadable only in bar of the costs of an action, must allege the defend-

¹ See article on the Requisites of a valid tender, by J. H. Lind, 17 Am. L. Reg. N. S. 745.

(g) *Brown v. Kempton*, 19 L. J. C. P. 169; *Edwards v. Glyn*, 2 E. & E. 29.

(h) *Ex parte Blackburn, in re Cheeseborough*, L. R. 12 Eq. 358.

(i) 3 & 4 Wm. IV. c. 98, sect. 6.

(k) See the 33 Vict. c. 10, sect. 4, as to the legalization of gold coins issued from colonial or foreign mints.

(l) 24 & 25 Vict. c. 99, sect. 17; *Wade's case*, 5 Co. 114 a.

ant's continued readiness to pay, accompanied by a payment into court of the money tendered. If the plaintiff can falsify the averment of the defendant's continued readiness, he avoids the plea altogether. (*m*) A demand after tender should be made personally; (*n*) and if there be two joint debtors, a demand of one is a demand of both. (*o*) "If the creditor is offered a larger sum than the amount due to him, and, without any objection on the ground of want of change, makes quite a collateral objection, the tender will be a good tender." (*p*) If the tender is in Bank of England notes, and change is required, which the creditor says he has not got, the tender is insufficient; but if no objection is made on the ground of want of change, the tender is good, provided enough has been tendered. (*q*) If provincial bank notes or cheques on bankers are offered in payment, and not objected to, but more money is required, the tender is good, if enough money has been tendered. (*r*)

* **Offers of Payment not amounting to a Tender.** — An [* 1216] offer of money by a debtor to a creditor, and a request on the part of the latter for a day's delay before receiving it, on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor. (*s*) We have already seen that readiness to pay a debt, without an actual tender of money or money's worth, is nothing; and, therefore, if a debtor merely offers to pay the debt, there is no tender; (*t*) but if the debtor, having the money at hand, offers cash, and the creditor tells him he need not give himself the trouble of offering it, or getting it out, or producing it, as he will not take it, the actual production of the money is then dispensed with, and there is a good tender. (*u*) And where a sum of money was tendered to the maid-servant of the plaintiff, who received it, and said she would take it to her master, and retired, and then came back with the money,

(*m*) *Coore v. Callaway*, 1 Esp. 116;
Rivers v. Griffiths, 5 B. & Ald. 630.

(*n*) *Edwards v. Yeates*, R. & M. 360.

(*o*) *Peirse v. Bowles*, 1 Stark. 323.

(*p*) *Bevans v. Rees*, 5 M. & W. 308;
Broom's Maxims, 129.

(*q*) *Black v. Smith, Peake*, 121; *Cadman v. Lubbock*, 5 D. & R. 289.

(*r*) *Polglass v. Oliver*, 2 Cr. & J. 15;
Jones v. Arthur, 8 Dowl. P. C. 442.

(*s*) *Jenkyns v. Brown*, 14 Q. B. 503.

(*t*) *Kraus v. Arnold*, 7 Moore, 59;
Leatherdale v. Sweepstone, 3 C. & P. 342.

(*u*) *Finch v. Brook*, 1 Sc. 70; *Harding v. Davies*, 2 C. & P. 78.

saying that her master would not receive it, it was held that this was evidence from which a jury, if they thought fit, might infer that a tender had been made. (*x*)

Conditional Tenders. — A tender clogged with conditions and reservations, and made in such terms that the party accepting the tender would be drawn into an admission against himself, is a bad tender; for the debtor has no right to expect the creditor to take the money, if by doing so he will furnish evidence against himself of the nature and extent of his demand. (*y*) Therefore an offer of money, to be accepted as “all that is due,” (*z*) or “in full of all demands,” (*a*) or “as the balance due,” (*b*) or as a “settlement,” (*c*) does not constitute a valid tender. But if the party offers the money as being all that he admits to be due, not requiring the other party to accept it as all that is due, but leaving the latter free to insist upon any ulterior demand, the tender is then a good tender. If he says, “I am come to settle,” or “I am come with the amount of your bill,” and then goes on to offer the money, leaving the other party, after he has got the money, to treat it as “a settlement,” or as “the amount of the bill,” or not, as he may think fit, the tender is a good tender. (*d*) A

tender “under protest” is a perfectly good tender. (*e*)
 [* 1217] If a debtor *tendering money requires a receipt for the amount, he ought himself to be prepared with the paper and writing materials, and the stamp, when a stamp is necessary, and tender them to the creditor together with the money. (*f*) A tender to one of several joint creditors is a good tender to all. (*g*) A tender to a clerk or servant having a general authority to receive money for his master or employer is a good tender to the latter. (*h*) When a solicitor by command of

(*x*) Anon., 1 Esp. 349.

(*y*) Hastings v. Thorley, 8 C. & P. 573; Foord v. Noll, 2 Dowl. N. S. 617.

(*z*) Sutton v. Hawkins, 8 C. & P. 259; Field v. Newport, &c. Ry. Co., 27 L. J. Ex. 396; 3 H. & N. 409.

(*a*) Cheminant v. Thornton, 2 C. & P. 51.

(*b*) Evans v. Judkins, 4 Campb. 156.

(*c*) Mitchell v. King, 6 C. & P. 237.

(*d*) Bowen v. Owen, 17 L. J. Q. B. 5; 11 Q. B. 135; Robinson v. Ferreday

8 C. & P. 752; Eckstein v. Reynolds, 7 Ad. & E. 80; Henwood v. Oliver, 1 Q. B. 409.

(*e*) Manning v. Lunn, 2 C. & K. 13; Scott v. Uxbridge & Rickmansworth Ry. Co., L. R. 1 C. P. 596; 35 L. J. C. P. 292; Sweny v. Smith, L. R. 7 Eq. 324; 38 L. J. Ch. 446.

(*f*) Laing v. Meader, 1 C. & P. 217; Richardson v. Jackson, 8 M. & W. 298.

(*g*) Douglas v. Patrick, 3 T. R. 683.

(*h*) Moffat v. Parsons, 5 Taunt. 308.

the creditor, writes for the debt, directing it to be paid to him, the solicitor, at his office by a day named, tender of the money to any person found in possession of the office will in general be sufficient. (i) And if the solicitor demands payment of the cost of his letter, which is refused, and a writ is issued, the writ may be set aside. (k) A tender to an executor may be good, although he has not proved the will, provided he afterward proves the will, and takes upon himself the burthen of administration. (l)

Apportionment of Periodical Payments. — By the Apportionment Act, 1870, (m) all periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly. The apportioned part is payable, in the case of a continuing payment, when the entire portion becomes due; and in the case of a payment determined by death or otherwise, when the entire portion would have become due. (n) But the act does not extend to annual sums made payable in policies of assurance of any kind; (o) nor to cases in which it is expressly stipulated that no apportionment shall take place. (p)

*SECTION II.

[*1218]

DISCHARGE BY CONSENT OF THE PARTIES.¹¹⁰

Dispensation of Performance. — It is competent to the parties to a parol contract to dispense by word of mouth with performance of the contract. Thus if a written contract for the sale of

(i) *Watson v. Hetherington*, 1 C. & K. 36; *Kirton v. Braithwaite*, 1 M. & W. 312; *Wilmot v. Smith*, 3 C. & P. 454; *M. & M.* 239; *Barrett v. Deere*, ib. 200.

(l) 1 Eq. Cas. Abr. 319.
(m) 33 & 34 Vict. c. 85.

(k) *Holmar v. Stevens*, 33 Law T. R.

(n) Sect. 3.

(o) Sect. 6.

(p) Sect. 7.

¹¹⁰ See Appendix, Vol. III.

goods provides for the transmission of the goods to the purchaser on a particular day, and the purchaser subsequently gives a verbal order for them to be sent a day later, performance of the original written contract as to the time of delivery is thereby dispensed with, so that the liability upon a contract in writing may be wholly or partially discharged before breach by a subsequent verbal agreement, (a) unless the written contract is required to be in writing by the statute of frauds, in which case it cannot be varied by any subsequent agreement by word of mouth only. (b) There is, however, no clause in the statute of frauds requiring the dissolution of a contract to be in writing; and it should seem that a contract required by the statute to be in writing may, before breach, be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering upon the contract which was in writing. (c) A waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding. (d)

Renunciation of a Contract by One Party amounting to Dispensation of Performance by Another Party.¹ — Non-payment on the

¹ As to rescission generally, see 2 Pars. Contr. 677, 780; 3 Pars. Contr. 208; Story, Contr. sects. 34, 1086, 1095, 1337, 1338; U. S. Dig. tit. *Contracts*, sects. 1987-2234; article on Rescission of contract, &c., 25 Alb. L. J. 384; *Graves v. White*, 87 N. Y. 463.

One who has been induced by fraud to enter into a contract, has his election either to deem the contract binding and sue for damages, or to rescind. *Pence v. Langdon*, 99 U. S. 578; *Smith v. Richards*, 13 Pet. 26; *Nelson v. Wood*, 62 Ala. 175; *Lindsey v. Veasy*, ib. 421; *Cooper v. McIlwain*, 58 Ala. 296; *Foster v. Gressett*, 29 Ala. 393; *West v. Waddill*, 33 Ark. 575; *Reed v. Peterson*, 91 Ill.

(a) *Stead v. Dawber*, 10 Ad. & E. 65; 2 P. & D. 452, adopting the language of *Goss v. Ld. Nugent*, 5 B. & Ad. 65.

(b) *Moore v. Campbell*, 10 Exch. 323; *Noble v. Ward*, 4 H. & C. 149; L. R. 2 Ex. 135; 36 L. J. Ex. 91.

(c) *Goss v. Ld. Nugent*, 5 B. & Ad. 66.

(d) *Darnley (Earl) v. L. C. & Dover Ry. Co.*, 36 L. J. Ch. 404; L. R. 2 H. L.

43.

one hand, or non-delivery on the other, may be evidence for a jury of an intention wholly to abandon the contract and set the

288; *Bradley v. Luce*, 99 Ill. 234; *Willcox v. Jackson*, 51 Iowa, 208; *Myton v. Thurlow*, 23 Kans. 212; *Farris v. Ware*, 60 Me. 482; *Wright v. Haskell*, 45 Me. 489; *Soper v. Stevens*, 14 Me. 133; *McShane v. Hazlehurst*, 50 Md. 107; *Skinner v. Brigham*, 126 Mass. 132; *McLean v. Richardson*, 127 Mass. 339; *Place v. Minister*, 65 N. Y. 89; *Getty v. Devlin*, 54 N. Y. 403; *Conkey v. Bond*, 36 N. Y. 427; *Perkins v. Partridge*, 30 N. J. Eq. 82; *Young v. Hughes*, 32 N. J. Eq. 372; *Crosland v. Hall*, 33 N. J. Eq. 111; *Henroid v. Neusbaumer*, 69 Mo. 96; *Poston v. Balch*, ib. 115; *Bigler v. Flickinger*, 55 Pa. St. 279; *Babcock v. Case*, 61 Pa. St. 427; *Short v. Stevenson*, 63 Pa. St. 95; *Clark v. Everhart*, ib. 347; *Bird's Appeal*, 91 Pa. St. 68; *Lowry v. McLane*, 3 Grant Cas. 333; *Pendarvis v. Gray*, 41 Tex. 326; *Wampler v. Wampler*, 30 Gratt. 454; *Walker v. Day*, 8 Baxt. 77; *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 659, 691; *Doggett v. Emerson*, ib. 700, 733; *Foreman v. Bigelow*, 4 Cliff. 508. And the remedy is not conditioned upon fraud only, but whenever one party is unable to perform a substantial part of the contract, the other party may rescind. *Pierce v. Wilson*, 34 Ala. 596; *Blen v. Bear River & Auburn Water, &c. Co.*, 20 Cal. 602; *Farris v. Ware*, 60 Me. 482; *Manahan v. Noyes*, 52 N. H. 232; *Hooper v. Strasburger*, 37 Md. 390; *Perkins v. Bailey*, 99 Mass. 61; *Kinney v. Kiernan*, 2 Lans. 492; *Stickter v. Guldin*, 30 Pa. St. 114; *Hartje v. Collins*, 46 Pa. St. 268; *North American Oil Co. v. Forsyth*, 48 Pa. St. 291; *Forsyth v. North American Oil Co.*, 53 Pa. St. 168; *Poor v. Woodburn*, 25 Vt. 234; *Downer v. Smith*, 32 Vt. 1; *Gates v. Bliss*, 43 Vt. 399; also notes on *Chandelor v. Lopus*, 1 Smith Lead. Cas. (7th Am. ed.) 299.

The election, however, must be made within a reasonable time. *Upton v. Trebilcock*, 91 U. S. 45; *Pence v. Langdon*, 99 U. S. 578; *Barfield v. Price*, 40 Cal. 535; *Heald v. Wright*, 75 Ill. 17; *Watson Coal Co. v. Casteel*, 68 Ind. 476; *Hall v. Fullerton*, 69 Ill. 448; *Memphis, &c. R. R. Co. v. Neighbors*, 51 Miss. 412; *Pratt v. Farrar*, 10 Allen, 519; *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311; *Hunt v. Stuart*, 53 Md. 225; *Weeks v. Robie*, 42 N. H. 316; *Bassett v. Brown*, 105 Mass. 551; *Williams v. Powell*, 101 Mass. 467; *Degraw v. Elmore*, 50 N. Y. 1; *Hammond v. Pennock*, 61 N. Y. 145; *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 223; *Leaming v. Wise*, 73 Pa. St. 173; *Morgan v. McKee*, 77 Pa. St. 228; *Matteson v. Holt*, 45 Vt. 336; *Whitcomb v. Denio*, 52 Vt. 382; *Rothschild v. Rowe*, 44 Vt. 389. And the party rescinding must in general offer to return anything obtained under the contract, so as to restore the condition of things existing before the contract was made. *Gay v. Alter*, 102 U. S. 79; *Emerson v. McNamara*, 41 Me. 565; *Cook v. Gilman*, 34 N. H. 556; *Poor v. Woodburn*, 25 Vt. 234; *Estabrook v. Swett*, 116 Mass. 303; *Cobb v. Hatfield*, 46 N. Y. 533; *Parkinson v. Sherman*, 74 N. Y. 72; *Roth v. Crissy*, 30 Pa. St. 145; *Beetern v. Burkholder*, 69 Pa. St. 249; *Morrow v. Rees*, ib. 368; *Williams v. Ketchum*, 21 Wis. 432; *Wilbur v. Flood*, 16 Mich. 40; *Michigan Central R. R. Co. v. Dunham*, 30 Mich. 128; *Blaney v. Hanks*, 14 Iowa, 400; *Mitchell v. Moore*, 24 Iowa, 394; *Neblett v. Macfarland*, 92 U. S. 101; *Potter v. Titcomb*, 22 Me. 300; *Willoughby v. Moulton*, 47 N. H. 205; *Renshaw v. Lefferman*, 51 Md. 277; *Smith v. Brittenham*, 98 Ill. 188; *Hyslip v. French*, 52 Wis. 513; *First Nat. Bank v. Yocum*, 11 Neb. 328. For rescission will not be allowed if the other party would thereby suffer irreparable loss. *Bulkley v. Morgan*, 46 Conn. 393; *Bond v. Ramsey*, 89 Ill. 29; *Baker v. Lever*, 67 N. Y. 304; *Mecke v. Life Ins. Co.*, 8 Phila. 6; *Knight v. Hough-talling*, 85 N. C. 17; *McCrillis v. Carlton*, 37 Vt. 139.

other party free. Where by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. (*e*) If A has agreed to have a steam-vessel at a named port by a day specified, and there to take on [* 1219] board and * carry a cargo to a particular destination, and B has agreed to have a cargo in readiness for shipment at the time and place appointed, and A, before the time arrives, repudiates the contract, and declares that he will not receive the cargo, B may treat this as a dispensation of performance of his part of the agreement, and may forthwith engage another vessel. (*f*) Where a manufacturer, by a contract of sale, had agreed to manufacture and deliver to a purchaser certain goods and chattels, by a day certain, and the purchaser, before the time appointed for delivery, told the manufacturer he need not manufacture them, as he had no occasion for them, and would not accept or pay for them, performance by the manufacturer was held to have been dispensed with. (*g*) Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. (*h*) So where a farmer undertook to supply a stable-keeper with wheat-straw for a specified time at a specified price per load, to be delivered at the rate of three loads in a fortnight, and nothing was said as to the time of payment, it was held to be an implied term or condition of the contract that each load should, if required, be paid for on delivery, and that, the stable-keeper having refused so to

(*e*) *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J. Ex. 19; see also *Honk v. Muller*, 7 Q. B. D. 92.

(*f*) *Danube & Black Sea Ry. Co. v. Xenos*, 11 C. B. N. S. 152; 31 L. J. C. P. 84, 284; 13 C. B. N. S. 825; *Hochster v. De La Tour*, 2 El. & Bl. 693; see *post*, p. *1255.

(*g*) *Cort v. Ambergate, &c.*, 17 Q. B. 127; 20 L. J. Q. B. 460; *Ripley v. M'Clure*, 4 Ex. 345; 18 L. J. Ex. 419.

(*h*) *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15.

pay, the farmer was not bound to supply any more straw after such refusal. (i) But a neglect or refusal by one party to fulfil his part of the contract will not release the other from his engagement, unless such neglect or refusal operates as an entire frustration of the whole contract. (k) Thus where the defendant agreed to supply the plaintiff with a certain quantity of coal to be delivered into the plaintiff's wagons at the defendant's collieries in equal monthly quantities during the period of twelve months, and during the first month the plaintiff only sent in wagons to receive less than one third of the stipulated quantity, it was held that the defendant was not on that account entitled to rescind the contract. (l) So, again, non-payment for the first portion of iron contracted to be delivered in two lots unattended by any other act on the part of the purchaser, does not put an end to the contract * so as to disentitle the purchaser [* 1220] to maintain an action for the non-delivery of the second portion, but only gives the seller remedy by action. (m)

Powers of Revocation and Defeasance of Contracts. — Where two or more persons enter into a contract of a continuing nature, one of them cannot by his own act discharge himself from liability, and put an end to the contract, without the consent of the other, unless there is an express power of defeasance reserved to him. Where two railway companies mutually agreed for the running of their engines and carriages over each other's lines, and neither company reserved to itself the power of putting an end to the contract by notice or otherwise, it was held that the contract was binding upon both companies for ever, and could not be varied against either party without the consent of that party. (n) Where one party agreed to furnish iron to another, to be delivered as required, it was held that the party who had thus agreed to furnish the iron could not put an end to the contract and refuse to supply the iron on the ground that the other party had not within a reasonable time required him to

(i) *Withers v. Reynolds*, 2 B. & Ad. 882.

(k) *Jonassohn v. Young*, 4 B. & S. 299; 32 L. J. Q. B. 385.

(l) *Simpson v. Crippin*, L. R. 8 Q. B. 14.

(m) *Freeth v. Burr*, L. R. 9 C. P. 208.

(n) *Gt. Northern Ry. Co. v. Manch., Sheff., &c. Ry. Co.*, 18 Law T. R. 344.

furnish iron ; that he ought in the first instance to inquire of the other if he meant to have the iron, and require him to give the order, and then, if the order was not given within a reasonable time, he might abandon the contract. (o) Parties may, by mutual assent and agreement, reserve to themselves the power of putting an end to the contract, by notice or otherwise, at any particular period, or upon the happening of any given event. When the contract is made defeasible by notice, the notice is good, although the party on whom it is served is insane. (p) When a party has reserved to himself the power of annulling a contract under certain contingencies, the courts will not permit the power to be exercised for the purpose of perpetrating a downright fraud ; but there must be a clear want of *bona fides* on the part of the person exercising the power, to warrant the interference of the court. (q)

Of the Release and Discharge of Covenants before Breach.¹—Covenants under seal could not at common law be discharged before breach by parol contract, whether executory or executed. (r) Neither could performance of a covenant be waived by parol at common law. Thus where a tenant covenanted to yield up at the expiration of his term all erections and [* 1221] improvements upon * the demised premises, and after the granting of the lease offered to erect a greenhouse, provided the landlord would permit him to remove it at the expiration of the term, and the landlord, by letter, promised so

¹ See 1 Story, Contr. sects. 63, 787 ; 2 Story, Contr. c. 71 ; 1 Pars. Contr. 26 ; 2 Pars. Contr. 713 ; also Tarr v. Northey, 17 Me. 113 ; Dunbar v. Dunbar, 5 Gray, 103 ; Noble v. Kelly, 40 N. Y. 415 ; Sherburne v. Goodwin, 44 N. H. 271 ; Sprague v. Gillett, 9 Met. (Mass.) 91 ; Ellis v. Esson, 50 Wis. 145 ; Gibson v. Gibson, 15 Mass. 112 ; Fullam v. Valentine, 11 Pick. 156 ; Clopper v. Union Bank, 7 Har. & J. 92 ; Guard v. Whiteside, 13 Ill. 7 ; Curley v. Harris, 11 Allen, 112 ; Dooley v. Virginia Fire, &c. Ins. Co., 3 Hughes, 221 ; Wagenseller v. Simmers, 97 Pa. St. 465 ; Veazie v. Williams, 3 Story, 611 ; Curtis v. Curtis, 40 Me. 24 ; Smith v. Gayle, 58 Ala. 600 ; Reed v. Shaw, 1 Blatchf. 245 ; Dambmann v. Schutting, 75 N. Y. 55 ; White v. Walker, 31 Ill. 422 ; Whitehill v. Wilson, 3 Penr. & W. 405 ; Montgomery v. Lampton, 3 Met. (Ky.) 519 ; Heckman v. Manning, 4 Col. 543.

(o) Jones v. Gibbons, 8 Exch. 920. v. Chambers, 30 L. J. Ch. 470 ; 29 Beav.

(p) Robertson v. Lockie, 15 Sim. 104.
286.

(q) Page v. Adam, 4 Beav. 269 ; (r) Spence v. Healey, 8 Exch. 668 ;
Roberts v. Wyatt, 2 Taunt. 268 ; Turpin Thames Iron Works & Ship Building
Co. v. Royal Mail Steam Packet Co., 31
L. J. C. P. 169 ; 13 C. B. n. s. 358.

to do, and the greenhouse was built, and the landlord died, and the tenant removed the greenhouse at the expiration of the term, it was held that the parol license could not operate as a discharge of the covenant, and that the tenant was responsible for the breach thereof. (s) But the liabilities upon a deed might in equity be diminished, and the effect of the contract controlled and altered, by collateral letters and writings not under seal; (t) and a parol license or dispensation may now be pleaded as a defence to an action upon the deed.

Of the Release and Discharge of Causes of Action Ex Contractu.—Whenever a contract, not being a bill of exchange or promissory note, had been broken, and one of the parties had become liable to an action for the breach, the cause of action could only be discharged at common law by a release under seal, or by an agreement between the contracting parties that something should be given or done on the one side, and received on the other, in satisfaction and discharge of the debt or damages resulting from the breach, and by the execution or fulfilment of this agreement, by the gift or performance and acceptance of the thing agreed to be given or done, termed in law “an accord and satisfaction.” (u) But a release or agreement amounting to a release, made upon good consideration, though not under seal, might have been enforced in equity. (x) And so might a representation by the creditor of his intention to release the debt, if acted upon by the debtor. (y) But “an agreement to abandon a claim, unless there be a consideration shown, is a mere *nudum pactum*.” Thus if there be an ascertained and admitted debt due, and the debtor agrees to pay half the debt on receiving a discharge in full, and the creditor accordingly gives a written acknowledgment of the receipt of the money in full of all demands, this will not discharge the remaining moiety of the debt, unless

(s) *West v. Blakeway*, 3 Sc. N. R. 199; *Poth. Obl. No.* 471–509; *Sellers v. Bickford*, 1 Moore, 460; *Thomson v. Brown*, ib. 358; *Cordwent v. Hunt*, 8 Taunt. 596; 2 Moore, 660; *Littler v. Holland*, 3 T. R. 592; *Gwynne v. Davy*, 1 M. & G. 857.

(t) *Smith v. E. I. Co.*, 13 Jur. 367.

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(u) 3 Hen. VI. pl. 36; *Treswaller v. Keyne*, Cro. Jac. 620; *Langden v. Stokes*, Cro. Car. 383; *Edwards v. Weeks*, 1 Mod. 262; 2 Mod. 259.

(x) *Taylor v. Manners*, L. R. 1 Ch. 48; 35 L. J. Ch. 128.

(y) *Yeomans v. Williams*, L. R. 1 Eq. 184; 35 L. J. Ch. 283.

the acknowledgment is under seal, or some valid consideration has been given and received for the discharge. Where goods have been sold and delivered, and the purchaser has neglected to pay the price, the cause of action that has arisen cannot be got rid of and discharged by a mere agreement between the [* 1222] plaintiff and defendant that the * contract of sale shall be rescinded or annulled, and the purchaser discharged from all liability thereon. (z)

Oral Renunciation of Claims on Bills and Notes.—Bills of exchange, however, which are regulated by the custom of merchants, formed formerly an exception to the general rule of law, that a cause of action once accrued could only be discharged by deed, or by accord and satisfaction; for the liability of an acceptor, though complete, might always, it was held, be discharged by an express renunciation on the part of the holder of his claim on the bill, although such renunciation were made by word of mouth only, unaccompanied with satisfaction or any solemn instrument. Thus where the defendant, having borrowed of his father-in-law £1000 at £4 per cent interest, gave his promissory note for the repayment of the amount, and the father-in-law subsequently said he would make him a present of the £1000, and got a 10s. receipt stamp, and signed a receipt for the £1000 and interest, and handed it to the defendant, but after that made a will bequeathing the promissory note to his executors, it was held that the defendant was discharged from all liability upon the note; for that by the law merchant there may be a release and discharge of a debt due on a bill of exchange by word of mouth; and promissory notes are by statute put on the same footing as bills. (a) But now such renunciation must be in writing, unless the bill be given up.

Release of One of Several Joint, or Joint and Several, Contractors.—Generally speaking, a release to one of several joint, or joint and several, covenantors or promisors, releases all. (b)

(z) *Edwards v. Chapman*, 1 M. & W. 231.

(a) *Foster v. Dawber*, 20 L. J. Ex. 385; 6 Exch. 839; *Willes, J., Cook v. Lister*, 13 C. B. N. S. 593; 32 L. J. C. P. 121.

(b) *Bac. Abr. Release* (G); *Co. Litt.* 232; *Lacy v. Kinaston*, 1 *Ld. Raym.* 690. A different rule prevails in the French law; *Poth. Obligations*, Nos. 581-585.

Therefore where the plaintiff, having received a sum of money from one of the parties to a promissory note, erased his name from the instrument, it was held that such erasure operated as a release to the other parties to the note. (*c*) But a party may give a qualified release, and discharge one of several joint, or joint and several, covenantors or promisors, and reserve his right of action against the others. Thus where a release of all actions was given to one of two partners, with a proviso that it should not prejudice any claims which the releasor had against the other partners, it was held that the release did not operate as a release to the other partners. (*d*) But a creditor cannot release one of * several joint debtors, and hold [* 1223] another liable by a reserve of remedies, (*e*) unless the original contract reserves to him the power of releasing one without discharging the others, (*f*) or unless the instrument of release can by reason of the context be construed, as it generally will, as a covenant not to sue, (*g*) not amounting to release of the action, but giving rise only to a cross claim for damages in case of breach. (*h*) Each particular release is to be construed according to the plain intention of the parties. (*i*)

General Releases.—A general release of all claims and demands will operate as a discharge and extinguishment of every known cause of action that existed at the date of the release; (*k*) but it no longer has the extensive operation which it formerly had at common law, and will not now extend to matters of which the releasor was entirely ignorant at the time he executed the release, and to which the instrument was never intended to extend; (*l*) and it may be restricted by the language of the recitals or of other parts of the deed. (*m*) A receipt in full of all

(*c*) *Nicholson v. Revill*, 4 Ad. & E. Q. B. 133; *Green v. Wynn*, L. R. 4 Ch. 675; *Cheetham v. Ward*, 1 B. & P. 633; 204; 38 L. J. Ch. 76.

Webb v. Hewitt, 3 Kay & J. 442.

(*d*) *Solly v. Forbes*, 2 Brod. & B. 38; 4 Moore, 450; *North v. Wakefield*, 13 Q. B. 541.

(*e*) *Cheetham v. Ward*, 1 B. & P. 633.

(*f*) *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J. Ex. 133.

(*g*) *Parke, B., Kearsley v. Cole*, 16 M. & W. 136; *Price v. Barker*, 24 L. J.

(*h*) *Ford v. Beech*, 11 Q. B. 852, 871;

Willis v. De Castro, 27 L. J. C. P. 246.

(*i*) *Walters v. Smith*, 2 B. & Ad. 889; *Ex parte Good*, 5 Ch. D. 46, C. A.

(*k*) *Tynan v. Bridges*, Cro. Jac. 300; Co. Litt. 291 b.

(*l*) *Lyall v. Edwards*, 6 H. & N. 337; 30 L. J. Ex. 193.

(*m*) *Haselgrove v. House*, 6 B. & S.

demands does not necessarily amount to a release. (*n*) The operation of a release is, of course, confined to debts and demands and causes of action which have actually accrued and become vested in the releasor at the date of the release, and does not extend to any contract which has not then been broken. (*o*) Any renunciation under seal of the benefit of a contract, or a covenant not to sue upon it, or an acknowledgment that the contract has been rescinded or discharged, will, if properly authenticated, operate as a release. (*p*) But the operation of a release may be controlled or qualified by a written undertaking or agreement not under seal. (*q*) A release "of all manner of demands" is the best release to him to whom it is made that he can have, and shall inure most to his advantage. (*r*) Such a release given after action brought will include the damages for the detention of the debt as well as the debt itself, and if given after judgment recovered, will include the execution. (*s*)

[* 1224] * **Conditional Release.** — A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with. (*t*) Thus a release may be conditional on the payment of money within a specified time, and in that case it must be shown that the money has been paid, or at any rate tendered. (*u*)

Fraudulent Releases. — Whenever a release has been fraudulently given to defeat an action, the court will set it aside and not allow it to be pleaded. (*x*)

975; 35 L. J. Q. B. 1; L. R. 1 Q. B. 101.

(*n*) *Lee v. Lancashire & Yorkshire Ry. Co.*, L. R. 6 Ch. 537.

(*o*) *Best, C. J., Radburn v. Morris*, 1 M. & P. 654; *Neale v. Sheffield, Yelv.* 192; *Payler v. Homersham*, 4 M. & S. 423; *Lambourne v. Cork*, 1 D. & R. 211.

(*p*) See *Hickmot's case*, 9 Co. 52 b, as to covenants not to sue.

(*q*) *Cocks v. Nash*, 9 Bing. 341; 4 M. & Sc. 162; *Baker v. Head*, 20 L. J. Ex. 444.

(*r*) Co. Litt. 508.

(*s*) *Tetley v. Wanless*, L. R. 2 Ex. 275.

(*t*) *Newington v. Levy*, L. R. 5 C. P. 607; *ib.* 6 C. P. 180; 39 L. J. C. P. 334; *ib.* 40 L. J. C. P. 29.

(*u*) *Fessard v. Mugnier*, 18 C. B. N. S. 286; 34 L. J. C. P. 126.

(*x*) *Sargent v. Wedlake*, 11 C. B. 732; *Payne v. Rogers*, 1 Doug. 407; *Hickey v. Burt*, 7 Taunt. 49; *Jones v. Herbert*, *ib.* 421; *Manning v. Cox*, 7 Moore, 617; *Barker v. Richardson*, 1 Y. & J. 362; *Rawstone v. Gandell*, 15 M. & W. 305; *Morrison, Ex parte, in re Clunn*, 33 L. J. Bk. 47; *De Pothonier v. De*

Composition in Bankruptcy. — A composition under the Bankruptcy Act, 1869, is, if the requirements of the act (*y*) have been complied with, binding upon all creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meeting at which the resolution to accept the composition was passed, as well as upon all who have voluntarily joined in the resolution; (*z*) but it will not affect or prejudice the rights of any other creditors. (*a*)

Covenants not to sue. — Where a creditor has covenanted that he will not put his contract in suit at any time, there the covenant amounts to a release; but when the covenant is not to sue for a certain time, or not to sue provided certain payments are made at specified times, (*b*) there it is only a covenant, not a release, unless it be a covenant not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, in which case it operates as a release by force of the condition, if the action be brought within the time. (*c*) Covenants not to sue have been held equivalent to a release to avoid circuity of action, — *i.e.* the absurdity of allowing A to recover against B in one action the identical sum which B has a right to recover in another against A. But if the parties thus opposed in interest are not the same, the principle cannot apply. If, therefore, one of two plaintiffs has covenanted not to sue for a joint debt due to them both, he is liable for a breach of covenant if both afterward sue; but the covenant so entered into by the one cannot be * treated as a release of the joint [* 1225] action by both. (*d*) “Where A is bound to B, and B covenants never to put the bond in suit against A, if afterward B will sue A on the bond, he may plead the covenant by way of release; but if A and B be jointly and severally bound to C in a certain sum, and C covenants with A not to sue him, that shall

Mattos, E. B. & E. 461; 27 L. J. Q. B. 260. As to a fraudulent release to deprive an attorney of his costs, see *Games, Ex parte*, 3 H. & C. 294; 33 L. J. Ex. 317.

(*y*) As to these, see sect. 126.

(*z*) *Campbell v. Im Thurm*, 1 C. P. D. 267; see *Breslauer v. Brown*, 3 Ap. Cas. 672; *Lewis v. Leonard*, 5 Ex. D. 165, C. A.

(*a*) Sect. 126, par. 7.

(*b*) *Ray v. Jones*, 19 C. B. N. S. 416; 34 L. J. C. P. 306.

(*c*) *Ayloff v. Scrimshire*, Carth. 63; *Deux v. Jefferies*, Cro. Eliz. 352; *Walker v. Nevill*, 3 H. & C. 403; 34 L. J. Ex. 73.

(*d*) *Walmesley v. Cooper*, 11 Ad. & E. 221.

not be a release but a covenant only, because he covenants only not to sue A, but does not covenant not to sue B; for the covenant is not a release in its nature, but only by construction, to avoid circuitry of action. (e)

Covenants not to sue for a Limited Time. — Covenants and agreements to suspend a right of action for some specified period of time are deemed to be contracts to forbear from suing for the time named, and are consequently not pleadable in bar of an action brought contrary to the agreement, but give rise to a cross claim for the damages resulting from the creditor's suing during the time he had agreed not to sue. (f) But where a deed contains a covenant for the payment of money on a particular day, subject to a proviso that no action shall be brought till after the expiration of a month, an action cannot be brought before the end of the month, as the proviso must be construed as extending the time of payment. (g) The ancient principle of law, that a right of action once existing, and by act of the party suspended for ever so short a time, is extinguished and gone for ever, does not hold in all cases, as clauses of forfeiture and defeasance are frequently annexed to contracts if they are attempted to be put in suit before the expiration of a certain period, in which case the right to sue is effectually suspended for the limited time. There are also cases in the books where, a contract having been broken, and a cause of action having accrued thereon, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that if the new contract is carried out by the new parties in all its integrity, the original cause of action is extinguished and gone for ever; and if it is not fully carried out, the party is remitted to his original right of action upon the original contract. To the general rule of law, also, that a cause of action once accrued cannot be suspended,

(e) *Fitzgerald v. Trant*, 11 Mod. 254; L. J. Q. B. 34; *Thimbleby v. Barron*, 3 Lacy v. Kynaston, 12 ib. 552; *Dean v. M. & W.* 216; *Ayliff v. Scrimsheire*, 1 Newhall, 8 T. R. 171; *Hutton v. Eyre*, Show. 43.
6 Taunt. 294.

(g) *Foley (Lady) v. Fletcher*, 3 H. &

(f) *Ford v. Beech*, 17 L. J. Q. B. N. 777; 28 L. J. Ex. 100.
116; 11 Q. B. 866; *Webb v. Salmon*, 19

there is an exception in favor of bills of exchange and promissory notes. (*h*)

* **Release by Novation and Substitution.**—The making of a new contract and the substitution thereof in the place and stead of the original contract, before breach of the latter, may operate as a discharge and extinguishment of the original contract. (*i*) One deed may be substituted for another, or a simple contract may be substituted for a deed.

Substitution of a New Contract in the Place of the Original Contract.—By the civil law, a novation arose when a new contract was entered into with intent to dissolve a former engagement, or a new debt was substituted for an old one. The old contract or debt was held to be extinguished by the new one contracted in its stead, whence a novation was included by the civilians amongst the different modes in which obligations were extinguished and discharged. (*k*) “A novation may take place,” observes Pothier, “by the intervention of a new creditor, where a debtor, for the purpose of being discharged from liability to his original creditor, by the order of that creditor contracts a new obligation in favor of a new creditor.” (*l*) A second kind of novation, observes Pothier, takes place by the intervention of a new debtor where another person becomes debtor in my stead, and is accepted by the creditor, who discharges me from the original debt. This kind of novation is called *expromission*. (*m*) “The party substituted,” observes Argentré, “is commonly a debtor of the person substituting, and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person substituting, by his giving his creditor a new debtor, and of that of the person substituted, by the new obligation which he contracts.” (*n*)

(*h*) *Belshaw v. Bush*, 11 C. B. 201; 22 L. J. C. P. 24; *James v. Isaacs*, 12 C. B. 800; 22 L. J. C. P. 73; *Tatlock v. Smith*, 3 M. & P. 676; *Stracey v. Bank of England*, 4 ib. 639.

(*i*) *Taylor v. Hilary*, 1 C. M. & R. 741.

(*k*) *Inst. lib. 3, tit. 30, de Novatione*;

Cod. lib. 8, tit. 42, sect. 8; *Dig. lib. 46, tit. 2, De Novationibus*; *Hobson v. Cowley*, 27 L. J. Ex. 205.

(*l*) Pothier, *Obligations*, No. 549.

(*m*) Pothier, *Obligations*, No. 546.

(*n*) Argentré, cited *Poth. Obl. No. 565*.

When several persons are mutually indebted to each other, they may, by agreement amongst themselves, vary their respective liabilities, and substitute one debt in the place of another. By a mutual contract and arrangement between all the parties interested — creditor, debtor, and payee — the original debts are extinguished, and the annihilation of those debts is a sufficient consideration for the promise to pay the new debt. “If A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B’s debt is extinguished, and C may recover that debt against A.” (o)

[* 1227] * “Although,” observes Lord Tenterden, “it is a general rule of law, that a chose in action cannot be assigned, yet it has been held that, where a defined and ascertained sum is due from A to B, and an equal or larger sum is due from C to A, and the three agree that C shall be B’s debtor instead of A, and C promises to pay B the amount owing to him by A, an action will lie by B against C,” (p) the original debt due from A to B being extinguished in favor of the new obligation; so that if the creditor “were to sue or issue execution against the original debtor, the latter might show that the plaintiff, on good consideration, gave up his remedy against him, and took the liability of the other instead, which, though not properly accord and satisfaction, would be a complete defence.” (q)

Where a quantity of gin had been sold by the plaintiff to a publican, who, being unable to pay for it, handed it over to the defendant, and when the plaintiff applied for payment, the publican told the plaintiff that the defendant would pay him, and the latter, happening to come into the room during the conversation, confirmed the publican’s statement, and agreed to keep the gin and pay for it, and the plaintiff assented to the arrangement, it was held that there was a substitution by consent of all parties of a new contract of sale and new purchaser, in lieu of the

(o) Buller, J., *Tatlock v. Harris*, 3 T. R. 180. now, however, Jud. Act, 1873, sect. 25, *post*, p. *1269.

(p) *Fairlie v. Denton*, 8 B. & C. 400; (q) *Tindal, C. J., Bird v. Gammon*, *Crowfoot v. Gurney*, 2 M. & Sc. 482; 5 Sc. 220. See now, however, Jud. Act, Inst. lib. 3, tit. 30, *De Novatione*; Cod. 1873, sect. 25, *post*, p. *1269.
lib. 8, tit. 42, sect. 8; Dig. 4, tit. 2. See

original contract. (r) So where the defendants, being indebted to T. & Co. in the sum of £768, and T. & Co. being indebted to the plaintiffs in a much larger amount, it was agreed by all of them that the defendants should pay to the plaintiffs the amount of their debt to T. & Co., it was held that the plaintiffs might maintain an action in their own name against the defendants for the amount of the debt, as all the parties interested had mutually assented to the change of liability, and the defendants had expressly agreed to pay the amount of their debt to the plaintiffs. (s)

In an action by two plaintiffs upon an account stated, it appeared that the defendant was indebted to Moor, one of the plaintiffs, in a large sum of money, and afterward the other plaintiff was admitted a partner with Moor, and then a further debt was contracted by the defendant with the new partnership, after which an account was settled between the defendant and the two plaintiffs, and it was agreed that all the money due to Moor before his partnership with the other plaintiff should be taken into that account, and that the balance should be paid to both the * plaintiffs; and it was held that the [* 1228] action was properly brought by them jointly. (t) But if there had been no special agreement or consent on the part of the defendant to substitute the one debt for the other, the plaintiffs would not, by reason of any agreement amongst themselves, have been entitled to join in the action. (u) But there must be a mutual agreement between all the three parties, the creditor, his immediate debtor, and the intended new debtor, for the substitution of the new debt in the place and stead of the original debt; for if that continues to subsist, there is no consideration for the new contract, and no valid substitution takes place, and the case, as regards the intended new debtor, "is no more than if I promise a stranger to whom I do not owe anything, that if he will accept me to be his debtor for £60, I will pay it to him; yet this is but a *nudum pactum*, because I was not

(r) *Browning v. Stallard*, 5 Taunt. 228; *Thompson v. Percival*, 5 B. & Ad. 450. 925.

(s) *Wilson v. Coupland*, 5 B. & Ald.

(t) *Moor v. Hill*, 2 Peake, 10.

(u) *Wilsford v. Wood*, 1 Esp. 183.

indebted to him before; and my promise to pay, if the other will receive it, is nothing but a mere voluntary promise, which does not bind me at all." (*v*)

Where A and B were both indebted to C, and B was also indebted to A, and it was agreed between B and C only, that B should take A's debt upon himself, and pay the amount thereof to C, it was held that there was no substitution of the one debt for the other, as A had not assented to the arrangement, and B's liability to him still continued. (*x*) If the agreement be made between A and B without the concurrence of C, the situation of the parties is not altered. (*y*) Argentré observes that the assent of the three parties is essential to the validity of the arrangement; that there must be the concurrence, first, of the original debtor, who procures another debtor in his stead; secondly, of the party who enters into an obligation instead of the original debtor to the creditor; and thirdly, of the creditor, who, in consequence of the obligation contracted by the party substituted, discharges the party substituting. "The intention of the creditor," he observes, "to discharge the first debtor, and to accept of the second in his stead, must be perfectly evident." (*z*) If, therefore, the plaintiff in these cases has not been a party to the agreement, so as to discharge his primary debtor, and the assent of B has not been obtained, so as to discharge the debt due to him from A, the plaintiff can have no right of action upon the defendant's promise to pay the money. If the consent

of all the three parties is not obtained so as to work [* 1229] an extinguishment of the intermediate *debt, the transaction amounts to what is termed by Pothier "a simple indication." "When I indicate to my creditor a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for the purpose, it is merely a mandate, and neither a transfer nor novation of the debt. I remain the debtor; and the person designated in the

(*v*) *Forth v. Stanton*, 1 Saund. 211;
Thomas v. Shillibeer, 1 M. & W. 124.

(*x*) *Cuxon v. Chadley*, 3 B. & C.
 591; *Liversidge v. Broadbent*, 4 H. & N.
 605; 28 L. J. Ex. 332.

(*y*) *Price v. Easton*, 4 B. & Ad. 433;
Cockrane v. Green, 30 L. J. C. P. 97; 9
 C. B. N. S. 448.

(*z*) Argentré, *Coutumes de Britt*, liv.
 40, sect. 2.

order does not become so in my stead." (a) An agreement between a creditor and two joint debtors, that the sole and separate liability of one of them shall be substituted in extinguishment and discharge of the joint liability, is a valid agreement, founded on a good consideration, "as the sole security of one of two joint debtors may be more beneficial to the creditor than the joint responsibility of both." (b)

Drafts and Orders for Money operating by Way of Novation and Substitution.¹ — An order addressed by a creditor to the defendant, his debtor, given to the plaintiff, to whom such creditor is indebted, in satisfaction of his debt, and presented by the plaintiff to the defendant, and assented to by the latter, operates as a substitution of a new debt in the place of the original demand. But the mutual assent of the three parties is essential to the novation, as the original demand is not extinguished and annihilated if the consent and concurrence of any one of the three are wanting. "When a creditor," observes Pothier, "indicates a person to whom the debtor may pay the amount of his debt, this indication is a mere mandate, which is revocable, and does not constitute any novation until it has been assented to by the debtor." By the common law, there must be not only an assent on the part of the debtor to whom the order is addressed,

¹ Regarding novation, consult 1 Story, Contr. c. 15; 1 Pars. Contr. 217; 3 Am. L. Reg. n. s. 65; *Jenness v. Lane*, 26 Me. 475; *Woodward v. Miles*, 24 N. H. 289; *Babcock v. Hawkins*, 23 Vt. 561; *Andrews v. Campbell*, 36 Ohio St. 361; *Flanagin v. Hambleton*, 54 Ind. 222; *Lister v. Clark*, 48 Iowa, 169; *Drake v. Hill*, 53 Iowa, 37; *Shaffer v. McKanna*, 24 Kan. 22; *Cadens v. Teasdale*, 53 Vt. 469; *Morriss v. Harveys*, 75 Va. 726; *Baker v. Frellsen*, 32 La. Ann. 822; *Calvo v. Davies*, 73 N. Y. 211; *Campbell v. Smith*, 71 N. Y. 26; *Dingeldein v. Third Ave. R. R. Co.*, 37 N. Y. 575; *Girard Ins. Co. v. Stewart*, 86 Pa. St. 89; *Merriman v. Moore*, 90 Pa. St. 78; *Beasley v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Ross v. Kennison*, 38 Iowa, 396; *McDowell v. Laev*, 35 Wis. 171; *Jordan v. White*, 20 Minn. 91; *Mason v. Hall*, 30 Ala. 599; *Rogers v. Gosnell*, 51 Mo. 589; *Bassett v. Hughes*, 43 Wis. 319; *Gresham v. Morrow*, 40 Ga. 487; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Manahan v. Noyes*, 52 N. H. 232; *Shepler v. Scott*, 85 Pa. St. 329; *Van Vranken v. C. R. & M. R. R. Co.*, 55 Iowa, 135; *Windham v. Doles*, 59 Ga. 265; *Hixon v. Hetherington*, 57 Ala. 165; *Trimble v. Strother*, 25 Ohio St. 378; *Leabo v. Goodes*, 67 Mo. 126; *Silverman v. Chase*, 90 Ill. 37; *Shamburg v. Ruggles*, 83 Pa. St. 148; *Brewis v. Duluth*, 13 Fed. Rep. 334, and cases cited.

(a) Pothier, *Obligations*, No. 569.

(b) *Lyth v. Ault*, 7 Exch. 673; 21 L. J. Ex. 217.

but there must be also the express concurrence of the person in whose favor the order is made, manifesting his assent to the change of liability. If he is not a party to the contract, the original debt is not released and extinguished; there is no novation, and can be no substitution. (c) Where a landlord, being indebted to the plaintiff, gave to the plaintiff an order upon the defendant, his tenant, to pay the plaintiff his, the landlord's, debt to the plaintiff out of the next rent that would become due, and the plaintiff transmitted this order to the defendant, but had not any communication with him upon the subject, but at the next rent-day the defendant produced the order to his landlord, and told the landlord he would pay the [* 1230] * amount of it to the plaintiff, and then paid the difference between the amount of the order and the sum due for the rent, and thereupon obtained a receipt from the landlord for the whole amount of the rent, and the plaintiff subsequently applied to the defendant for the debt specified in the order, when the defendant refused to pay it, and the plaintiff then brought an action for the money, it was held that, as there had been no personal communication between the plaintiff and defendant upon the subject of the order, and the plaintiff had not consented to look to the defendant instead of his original debtor for the payment of the money mentioned therein, he could not maintain his action. (d) And where the plaintiff, being indebted to one Jones, gave the defendant £8 to pay Jones, and the defendant gave the plaintiff a written promise to pay the money, but before he had communicated with Jones and promised to pay him the money, and before Jones had consented to look to him instead of the plaintiff for the amount, the plaintiff countermanded the order, and required the defendant to return him the money, it was held that he was entitled so to do, and that the defendant was bound to pay it back, inasmuch as he had not

(c) *Williams v. Everett*, 14 East, 597; *Noble v. Nat. Dist. Co.*, 5 H. & N. 228; 29 L. J. Ex. 210. In Justinian's Institutes, it is ordained, "*Solum novationem prioris obligationis fieri, quoties hoc ipsum inter contrahentes expressum fuerit,*"

quod propter novationem prioris obligationis convenerunt: alioquin et manere pristinam obligationem, et secundam et accedere." — Lib. 3, tit. 30, sect. 3.

(d) *Wharton v. Walker*, 4 B. & C. 163; 3 D. & R. 288.

placed himself under any engagement with Jones to pay it to him. (e)

When, however, the debtor or the depositary of the money has assented to the order, and promised the payee or remittee to hold the amount specified at his disposal, the authority to pay the money is irrevocable, the original debt is discharged, and none of the parties can then recede from the arrangement. (f) D applied to the plaintiff to lend him the sum of £70, but the plaintiff refused to advance it without security; whereupon D gave to the plaintiff an order upon the defendants, who were his debtors, to pay to the plaintiff the amount of their debts. This order was forwarded by the plaintiff to the defendants, with a request that they would acknowledge their having given him, the plaintiff, credit for it. The defendants accepted the order, and promised that they would pay all the money that they owed D to the plaintiff, and the plaintiff then advanced £70 to D. Subsequently the defendants refused to pay the amount of the debt to the plaintiff, and an action having been brought against them by the latter in his own name, it was held that he was entitled to recover it. (g)

A sum of money being due from the defendant to a Mr. *Streather upon a balance of account, the exact [* 1231] amount of which had not been ascertained, Streather gave to Messrs. Solly & Sons, to whom he was largely indebted, a letter addressed to the defendant, saying, "I shall be obliged by your paying to Messrs. Isaac Solly & Sons the balance due to me for building; and their receipt shall be a sufficient discharge to you." This letter was forwarded by Solly & Sons to defendant, inclosed in a letter from themselves, requesting "his due attention to the order." The defendant replied, "I received your letter, inclosing Mr. Streather's, and shall be happy to make the payment to you, instead of to him, as requested;" and it was held that the defendant, after his receipt and acceptance of the order, held the money mentioned therein at the disposal of Messrs.

(e) *Owen v. Bowen*, 4 C. & P. 93-96; *Lacy v. M'Neile*, 4 D. & R. 9; *Dickinson v. Marrow*, 14 M. & W. 719.
Cobb v. Becke, 6 Q. B. 930.

(f) *Meert v. Moessard*, 1 M. & P. (g) *Israel v. Douglas*, 1 H. Bl. 239.
11; *Peate v. Dicken*, 1 C. M. & R. 430;

Solly, and was accountable to them, and to no one else, for the amount deposited in his hands. (*h*)

In these cases, when, by the accession and agreement of all the parties interested, the original or intermediate debt is extinguished, the promise to pay the amount thereof to a third party is not a promise to answer for the debt of another within the statute of frauds, as no such debt exists: it is a new, original, and independent engagement, founded upon the merger and extinguishment of the pre-existing debt or demand. (*i*) If, however, a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. (*k*) For an order given by a debtor to his creditor upon a third person, having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund. (*l*)

Novation in the Case of Life Assurance Companies. — By the 35 & 36 Vict. c. 41, sect. 7, where a company, either before or after the passing of that act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy, is by reason of any such payment made after the passing of that act, or by reason of any other act done after the passing of that act, to be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized.

[* 1232] *** Substituted Performance of Something different from what was stipulated to be done.** — If the obligor of a bond has bound himself to pay £20,000 by a day named, it has been held not to be essential to the discharge of the condition and the defeasance of the bond to show that the money was

(*h*) *Crowfoot v. Gurney*, 2 M. & Sc. 473; *Hutchinson v. Heyworth*, 9 Ad. & E. 375.

(*k*) *Ex parte South*, 3 Sw. 392.

(*l*) *Burn v. Carvalho*, 4 My. & Cr. 690, 702; *Addison v. Cox*, L. R. 8 Ch.

(*i*) *Anstey v. Marden*, 1 B. & P. N. R. 131.

paid ; but that it is enough to prevent a forfeiture for the obligor to show that, before or upon the day appointed for payment of the money, he gave to the obligee "a horse, or a cup of silver, or a ring of gold, or any such other thing, in full satisfaction of the money, and that the latter received it in satisfaction, though the horse or the other thing were not of the twentieth part of the value of the money." (m) And where a defendant has covenanted to pay a sum of money to the plaintiff, it is competent to the defendant to show that, at the time appointed for the payment of the money, the defendant tendered to the plaintiff, and the plaintiff accepted and received, part payment in goods in lieu of money. (n)

Discharge by Accord and Satisfaction.¹ — If before action the defendant delivers to the plaintiff, and the plaintiff accepts from the defendant, either money or chattels, or securities for money, in satisfaction and discharge of the debt or cause of action, that is a good answer to an action for a debt or for damages for a breach of contract, whether the contract be under seal, or whether it be a simple contract, and whether the action be founded on a deed or on a parol agreement. (o) If a creditor tells his debtor that he will make him a present of the debt, and desires him to purchase a stamped receipt for the amount of the debt in full of all demands, and the debtor purchases the receipt, fills it up, and

¹ Concerning accord and satisfaction, see 2 Story, Contr. c. 68 ; 2 Pars. Contr. 681 ; also *Wellington v. Kelly*, 84 N. Y. 547 ; *Patillo v. Smith*, 61 Ga. 265 ; *Harvey v. Tama County*, 53 Iowa, 228 ; *Baker v. Stinchfield*, 57 Me. 363 ; *Ridlon v. Davis*, 51 Vt. 457 ; *Costello v. Cady*, 102 Mass. 140 ; *Goodrich v. Stanley*, 24 Conn. 613 ; *Miller v. Hatch*, 72 Me. 481 ; *Blake v. Blake*, 110 Mass. 202 ; *Guild v. Butler*, 127 Mass. 386 ; *Jones v. Perkins*, 29 Miss. 142 ; *Bradshaw v. Davis*, 12 Tex. 336 ; *Mason v. Campbell*, 27 Minn. 54 ; *Kromer v. Heim*, 75 N. Y. 574 ; *White v. Gray*, 68 Me. 579 ; *Pettis v. Ray*, 12 R. I. 344 ; *Wormer v. Waterloo Agricultural Works*, 50 Iowa, 262 ; *Bailey v. Cowles*, 86 Ill. 333 ; *State v. Story*, 57 Miss. 738 ; *Overton v. Conner*, 50 Tex. 113 ; *Bragg v. Pierce*, 53 Me. 65 ; *Panzerbeiter v. Waydell*, 21 Hun, 161 ; *Simmons v. Hamilton*, 56 Cal. 493 ; *Lathrop v. Page*, 129 Mass. 21 ; *Miller v. Hatch*, 72 Me. 481 ; *Grinnell v. Spink*, 128 Mass. 25 ; *Bryan v. Brazil*, 52 Iowa, 350 ; *Watts v. French*, 19 N. J. Eq. 407 ; *McKenzie v. Culbreth*, 66 N. C. 534 ; *Lankton v. Stewart*, 27 Minn. 346.

(m) Litt. sect. 344 ; and see Co. Litt. 213 a ; *Anon.*, Dyer, 56 b, pl. 18.

(n) *Smith v. Battams*, 26 L. J. Ex. 232.

(o) *Blake's case*, 6 Co. 43 b ; 44 a ; Bro. Abr. *Accord*, pl. 11 ; *Andrew v. Boughey*, Dyer, 75 b ; *Lavery v. Turley*, 6 H. & N. 239 ; 30 L. J. Ex. 49.

takes it to the creditor, who signs it, the purchase and payment of the paper and stamp, and the filling up of the receipt at the request of the creditor, do not amount to an accord and satisfaction of the debt. (*p*) To constitute acceptance there must be an act of the will; but if the party accepts the thing, though but for a moment, in satisfaction, he cannot afterward, by his subsequent dissatisfaction, get rid of the effect of it. (*q*)

An Accord Executory, or a contract to do what the party has already bound himself to perform, and has left unperformed, has been held to be no bar to an action, (*r*) as where an agreement had been made between the plaintiff and defendant [* 1233] to submit the *plaintiff's claim to arbitration, and to abide by the award, and arbitrators had been appointed, who had taken upon themselves the burthen of the reference, and a reasonable time for making their award had not elapsed; (*s*) or where it was agreed between the plaintiff and defendant that the defendant should pay the plaintiff £3 and his attorney's bill, and he paid the £3 and was always ready to pay the bill, but the plaintiff never showed him the bill; (*t*) or where the defendant irrevocably constituted the plaintiff his agent to receive money due to the defendant to an amount exceeding the debt, and authorized the plaintiff to retain the debt out of such money when received, and the plaintiff might and ought to have received such money pursuant to the authority confided to him by the defendant, but did not receive it in consequence of his own default and want of care, whereby the money became wholly lost to the defendant; (*u*) or where the defendant gave, and the plaintiff accepted, an order from the defendant on some third party for the delivery of certain securities for money to be received by the plaintiff in satisfaction and discharge of the cause of action, and the securities would have been delivered to the plaintiff if he had presented the order, but the plaintiff kept the order in his hands an unreasonable time without presenting it, whereby the securi-

(*p*) *Foster v. Dawber*, 20 L. J. Ex. 385; 6 Exch. 839.

(*q*) *Hardman v. Bellhouse*, 9 M. & W. 600.

(*r*) *Bayley v. Homan*, 3 Bing. N. C. 915.

(*s*) *Harris v. Reynolds*, 7 Q. B. 71; 14 L. J. Q. B. 241.

(*t*) *Cock v. Honychurch*, T. Raym. 203; *Carter v. Wormald*, 1 Exch. 86.

(*u*) *Gifford v. Whittaker*, 6 Q. B. 249.

ties became wholly lost to the defendant. (x) But if, by a subsequent executory simple contract, made and accepted in satisfaction of a simple contract debt or cause of action, increased liabilities are undertaken by the defendant, if an additional sum of money is agreed to be paid, or additional acts and duties are agreed to be performed, for the non-performance of which an action will lie against the defendant, or if a surrender or exchange of securities has been agreed upon, or an apportionment of property and debts, this new contract, with the remedies thereupon, will constitute a good accord and satisfaction. (y) The substitution, by agreement of all parties, of the separate liability of one of several persons jointly liable, may be a good satisfaction and discharge of the joint liability of the others. (z)

Delivery and Acceptance of Specialty Securities, or of Additional Simple Contract Securities, in Satisfaction and Discharge of Simple Contract Debts and Causes of Action, pursuant to the parol agreement of the parties in that behalf, constitute a good accord and satisfaction of the simple contract debt or cause of action, by * reason of the superiority of the [*1234] specialty security to the simple contract, provided the specialty security is co-extensive in its operation and legal effect with the antecedent simple contract, and was given and accepted in lieu thereof, and not as a collateral security. (a) But if the securities are accepted on the faith of a representation by the other party that they are valid and binding, and they turn out not to be so, the transaction may be repudiated in equity by the party who has been deceived. (b) Where a debtor by simple contract executed a deed in which he admitted the amount of his debt and secured it by an assignment of property to his creditor, but the deed contained no covenant or agreement to pay the debt, it was held that the deed did not make the debt a specialty. (c) The delivery and acceptance of a negotiable secu-

(x) *Griffiths v. Owen*, 13 M. & W. 58.(y) *Com. Dig. Accord* (B 4). As to pleading an agreement by way of accord and satisfaction, see *Barclay v. Bank of New South Wales*, 5 Ap. Cas. 374.(z) *Lyth v. Ault*, 21 L. J. Ex. 217; 7 Exch. 669.(a) *Price v. Moulton*, 10 C. B. 561; *Yates v. Aston*, 4 Q. B. 196.(b) *Stears v. South Essex Gas Co.*, 9 C. B. n. s. 180; 30 L. J. C. P. 49.(c) *Marryat v. Marryat*, 28 Beav. 224; 29 L. J. Ch. 665; *Jackson v. North-East. Ry. Co.*, 7 Ch. D. 573.

rity, in satisfaction and discharge of an existing debt, is a good accord and satisfaction, although such acceptance is for a less amount than the debt. (*d*) But in the absence of any agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt. (*e*) A bill of exchange received by one of two joint creditors will be a good satisfaction and discharge of the debt due to both, if the one creditor agrees to receive, and does receive, the bill in satisfaction and discharge of the joint debt. (*f*)

Composition Deed and Agreements. — When creditors covenant or agree by deed to take a certain specified composition of so much in the pound on the amount of their debts, the operation of the deed as a satisfaction and discharge of the debt is in general made dependent upon the composition being paid at the time appointed, so that, if the debtor makes default in carrying into effect his part of the contract, the deed will not operate as a satisfaction and discharge, but the creditors will be remitted to their original rights. An agreement by simple contract on the part of a creditor, to accept a composition of so much in the pound on the amount of his debt, cannot be set up against an action of debt upon a bond or covenant; (*g*) for a bond or covenant, or a specialty debt, cannot be satisfied and discharged by parol agreement; and in the case of a simple contract debt, if the agreement for the composition is only between the debtor and a single creditor, it is inoperative as a discharge of the debt, as there is no consideration for the agreement by the creditor, on receiving part of the debt, to give up the [* 1235] *residue; (*h*) but if some additional security is taken, or the liability of some new party is introduced into the agreement, the case is different. (*i*) When some or all the creditors join together and agree to take a portion of the debts

(*d*) *Sibree v. Tripp*, 15 M. & W. 35; 15 L. J. Ex. 318; *Curlewis v. Clark*, 3 Exch. 375; 18 L. J. Ex. 144; *Soward v. Palmer*, 2 Moore, 274; *Goddard v. O'Brien*, 9 Q. B. D. 37.

(*e*) *London, Birmingham, & South Staffordshire Bank, In re*, 34 L. J. Ch. 418; 34 Beav. 332.

(*f*) *Thompson v. Percival*, 5 B. & Ad. 925.

(*g*) *Lowe v. Eginton*, 7 Pr. 604.

(*h*) *Lynn v. Bruce*, 2 H. Bl. 319.

(*i*) *Steinman v. Magnus*, 11 East,

393.

due to them, in satisfaction and discharge of such debts, and not to sue the debtor, the joint agreement to accept the composition and relieve the debtor from his embarrassments is a sufficient consideration to each of them for the promise or agreement of each to accept the composition and discharge the debtor; (*k*) and if the agreement is carried into effect by the payment and receipt of the composition, there is a good accord executed, which is pleadable in discharge of any action brought by a creditor who is a party to the composition agreement for the recovery of the residue of his debt. If, however, the composition is not paid, the agreement will be a mere accord executory, producing no satisfaction of the debt, and the creditors will be remitted to their original rights: (*l*) and when the agreement is founded on the joint assent of all the creditors, all must sign, or none will be bound thereby. (*m*)

If a debtor makes an assignment of all his property to a trustee for the benefit of such of his creditors as shall come in and execute the deed, and any one of the creditors communicates with the trustee, and assents by word of mouth to the transaction, so as to create the relationship of trustee and *cestui que trust* between himself and the trustee, the assignment cannot afterward be revoked. (*n*) And where the party taking the legal interest under the deed has also a beneficial interest, the property will pass to him unless he expressly disclaims. (*o*) When the composition agreement provides additional security for the payment of the composition beyond what the creditors previously possessed for the payment of the entire debt,—if, for instance, a surety comes forward and pledges himself to the payment of the composition, or if the debtor assigns all his property to trustees to be divided amongst his creditors, (*p*) it is for a jury to determine whether the agreement itself, with the additional security thereby provided for the payment of the composition, was accepted as a substitution for, or in satisfaction and dis-

(*k*) *Norman v. Thompson*, 4 Exch. 755.

(*l*) *Heathcote v. Crookshanks*, 2 T. R. 24; *Garrard v. Woolner*, 8 Bing. 264; 1 M. & Sc. 336; *Shipton v. Casson*, 5 B. & C. 378; and see *post*, p. *1246.

(*m*) *Boyd v. Hind*, 25 L. J. Ex. 246.

(*n*) *Harland v. Binks*, 15 Q. B. 720.

(*o*) *Siggers v. Evans*, 5 Ell. & Bl. 377; 24 L. J. Q. B. 305.

(*p*) *Tatlock v. Smith*, 3 M. & P. 683.

charge of, the original debts, or whether it was the performance of the agreement by the actual payment and acceptance of the composition itself, which was offered on the one side, [* 1236] and accepted on *the other, in satisfaction and discharge. In the former case, the right to sue for the original debts would be extinguished from the time of the making of the agreement, and the remedy would be upon the agreement for the recovery of the instalment. In the latter case there would be no satisfaction or discharge of the debts until the composition was actually paid and received. (*q*)

Where by an agreement between a debtor and his creditors the debtor was to give, and the creditors to accept, certain securities for the payment of a certain portion of the debts due to each, and the creditors were to forbear from enforcing their original demands, it was held that this was a new agreement substituted in the place of the original contracts between the debtor and his creditors, which were extinguished, and that the creditors consequently could no longer sue for their original debt. (*r*) And where a creditor signed an agreement to accept a composition of five shillings in the pound on the amount of his debt, payment of such composition to be secured by the joint note-of-hand of the debtor and his father, and the joint note-of-hand was accordingly delivered to him, it was held that this amounted to an accord and satisfaction of the original debt, and was a complete discharge of the debtor's liability in respect thereof. (*s*) If a third party comes forward and guarantees the payment of a certain sum to creditors, who execute the deed by a day named, time is of the essence of the contract, and the benefit of the deed is confined to those who execute it by the day named. (*t*)

Where the plaintiff by his own act has prevented the satisfaction from being made pursuant to the terms of the accord or agreement, the accord will, as to him, be deemed to be accomplished, and that which was agreed to be done will be taken as

(*q*) *Cork v. Saunders*, 1 B. & Ald. 50.

(*t*) *Williams v. Mostyn*, 33 L. J. Ch.

(*r*) *Good v. Cheeseman*, 2 B. & Ad. 334.

54; *Crowe v. Lysaght*, 12 Ir. C. L. R. 481.

(*s*) *Lewis v. Jones*, 4 B. & C. 506.

done. (u) If the amount of the debt is not specified, the creditor will be bound for his actually existing debt which is capable of proof. (x)

Transfer of Property by way of Accord and Satisfaction. — Where property, real or personal, is accepted in satisfaction of a debt, care should be taken so to assign the property that the transaction may not be avoided either as a fraud on the other creditors of the assignor, or as an act of bankruptcy. Every transfer which is fraudulent as against creditors is also void as against the trustee in bankruptcy. (y)

*** Accord and Satisfaction with One of Several Joint [* 1237] Plaintiffs.** — Where several persons are joined together in suing upon a joint cause of action, all are bound by the act of one; and therefore a satisfaction to one of several joint plaintiffs of the joint cause of action in respect of which they sue is in general a satisfaction to all, whether made before or after the commencement of the action. (z) So a man may pay a debt to one of several persons with whom he has contracted jointly, and the inability of bankers so to discharge themselves arises from the particular contract which exists between them and their customers. (a)

SECTION III.

DISCHARGE BY OPERATION OF LAW.¹¹¹

Alterations of Contracts in Writing.¹ (aa) — If a deed, after it has been signed, sealed, and delivered, or a simple contract in

¹ The test for determining whether or not the alteration makes a new contract is this, — If the object of the alteration is merely to bring out more clearly the real

(u) *Reay v. White*, 1 C. & M. 748; (a) *Husband v. Davis*, 10 C. B. 645; *Bradley v. Gregory*, 2 Campb. 383. 20 L. J. C. P. 118; *Foley v. Hill*, 2

(x) *Harry v. Wall*, 1 B. & Ald. 103. H. L. Cas. 28.

(y) *Doe v. Ball*, 11 M. & W. 531.

(aa) As to alterations in bills and

(z) *Wallace v. Kelsall*, 7 M. & W. notes, see *ante*, p. * 779.

writing after it has been finally completed and signed, is altered in any material part with the privity and assent of the parties to it, a fresh contract is created which puts an end to the first contract. (b) If after a party has signed his name to a contract, he makes an interlineation to correct a mistake or add a new term, it is not necessary for him to re-sign the contract. (c) And a contract in writing which is sufficient within the statute of frauds, cannot be invalidated or affected by a subsequent abortive attempt to put it into a more formal shape. (d) If the alteration, whether it be by interlineation, addition, drawing a line through the words, or writing new letters on the old, has been made without the consent of the parties against whom the contract is sought to be enforced, either by the plaintiff who sues upon the contract, or by some other person whilst the contract was in the custody or possession of the plaintiff, the alteration will discharge the original contract without substituting any fresh contract in its place. But if the alteration has been made by the defendant, or some third party, without the plaintiff's consent, whilst the contract was out of the plaintiff's hands, the alteration will have no effect, and the contract will remain as it originally stood; provided *the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed. (e) If the

intention of the parties at the time the original contract was executed, then the original contract continues in force. But if its object is to effectuate a change of intention subsequent to the execution of the original contract, then there is a new contract made thereby. *Briggs v. Vermont Central R. R. Co.*, 31 Vt. 211; *Vicary v. Moore*, 2 Watts, 451; *Dow v. Jewell*, 18 N. H. 340; *Speake v. United States*, 9 Cranch, 28; *Boardman v. Gore*, 1 Stew. 517; *Woolley v. Constant*, 4 Johns. 54; *Ex parte Kerwin*, 8 Cow. 118; see also U. S. Dig. tit. *Alteration*, &c., and titles of particular contracts, and authorities on Novation.

A written contract not required to be in writing may be changed by parol, and the agreement to make the change need not have any new consideration. *Brown v. Everhard*, 52 Wis. 205. The terms of a contract under seal may be varied by a subsequent parol agreement, at least in equity. *Dearborn v. Cross*, 7 Cow. 48; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Fleming v. Gilbert*, 3 Johns. 528; *Canal Co. v. Ray*, 101 U. S. 522.

(b) *Pigot's case*, 11 Co. 27 a.

(c) *Bluck v. Gompertz*, 7 Exch. 862.

(d) *Heyworth v. Knight*, 17 C. B. 298; 33 L. J. C. P. 298.

(e) *Waugh v. Bussell*, 5 Taunt. 710;

Hemming v. Trenery, 9 Ad. & E 934;

Henfree v. Bromley, 6 East, 310; *Raper v. Birkbeck*, 15 East, 17.

alteration is of such a nature as to render this a matter of doubt, the contract is extinguished and destroyed as effectually as if the writing had been obliterated. (*f*) But it is not every alteration of a contract in a material particular that will avoid or nullify it. The erasure, for example, of the name of a shareholder from a deed of settlement of a joint-stock company does not prevent the deed from being evidence that another person, whose name is not erased, is a shareholder of the company. (*g*) Where the obligation is by reason of the instrument, and there is a material alteration in the instrument, the instrument is void; but where the obligation is by reason of the parol contract of the parties, the writing may be used as evidence of the terms of the contract, notwithstanding the alteration. (*h*)

The following alterations and additions to simple contracts, made without the privity and assent of the parties sued thereon, have been held to discharge the contract, — viz., the affixing of a seal to the defendant's signature of a simple contract, whilst the contract is in the possession or under the control of the plaintiff, so as to give the contract the character and appearance of a deed; (*i*) the striking out of the body of a policy of insurance the time of the warranty of sailing, and inserting in the margin of the policy a different time of sailing without the sanction of the underwriter, after the policy has been subscribed by him; (*k*) the insertion in a broker's bought and sold note, either by the vendor himself or by the broker at his request, after the notes have been exchanged, of a stipulation to the effect that damaged articles are to be taken at a valuation, (*l*) or that the things sold are to be of the vendor's own manufacture. (*m*)

Immaterial Alterations. — But whenever the alteration is immaterial, the contract is not vitiated. (*n*) Thus where a house

(*f*) *Davidson v. Cooper*, 13 M. & W. 352; *Crookewit v. Fletcher*, 1 H. & N. 913; 26 L. J. Ex. 153.

(*g*) *Agricult. Cat. Ins. Co. v. Fitzgerald*, 16 Q. B. 432; 20 L. J. Q. B. 244.

(*h*) *Pattinson v. Luckley*. L. R. 10 Ex. 330.

(*i*) *Davidson v. Cooper*, 13 M. & W. 352.

(*k*) *Fairlie v. Christie*, 7 Taunt. 416.

(*l*) *Powell v. Divett*, 15 East, 29.

(*m*) *Mollet v. Wackerbath*, 5 C. B. 191; 17 L. J. C. P. 47. As to alterations in bills and notes discharging the contract, see *ante*, p. * 779.

(*n*) *Aldous v. Cornwell*, L. R. 3 Q. B. 573; 37 L. J. Q. B. 201; *Suffell v. Bank of England*, 7 Q. B. D. 270, since reversed on appeal.

was by mistake described in a lease as No. 38, whereas it was in fact No. 35, and the 8 was altered into a 5 whilst the lease was in the plaintiff's hand, it was held that the contract was not avoided by the alteration. (o) A bond remaining in [* 1239] the hands of the * agent of the obligor as an escrow is not avoided by the addition of another obligor, with the assent of the agent, before the delivery of the instrument to the obligee. (p) And when a deed *inter partes* is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, will not avoid the deed. (q)

Evidence to explain Alterations. — It lies upon the party suing upon an altered contract to account for any material alteration that appears upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument.

Cancellation of Contracts. — If a contract is cancelled by mistake, the cancellation will be of no effect if the writing is legible and not obliterated. Where the seals of a deed were torn off by a little boy in sport, it was held that the operation of the deed was not affected thereby. (r) But it is otherwise if the seals are torn off by the agreement of all the parties to a deed, with intent to cancel and annul the instrument. (s) If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces can be pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it in ignorance of its having been cancelled. (t)

Alteration of Deeds. — If after a deed is executed, material blanks purposely left in it are filled up with the assent of all the parties to the instrument, or if a schedule is added to the deed describing certain property upon which the deed is to operate, and

(o) *Hutchins v. Scott*, 2 M. & W. 676; *Hall v. Chandless*, 12 Moore, 316; 816; *Sanderson v. Symonds*, 4 Moore, 4 Bing. 123.

46.

(r) *Argoll v. Cheney*, Palm. 403.

(p) *Matson v. Booth*, 5 M. & S. 226;
Hudson v. Revett, 2 M. & P. 691.

(s) 1 Shep. Touch. 70.

(t) *Ingham v. Primrose*, 28 L. J. C. P.

(q) *Doe v. Bingham*, 4 B. & Ald. 295; 7 C. B. n. s. 82.

the deed is insensible and inoperative without the schedule, (*u*) or if a new covenantor is added, (*x*) the deed must be re-delivered, (*y*) and must have a fresh stamp; (*z*) but blanks left for filling in dates previously agreed upon, or the names of persons not being parties to the deed, may be filled up after the execution of the instrument. (*a*) And a bond remaining in the hands of the agent of the obligor as an escrow, is not avoided by the addition of * another obligor, with the assent of [* 1240] the agent, before the delivery of the instrument to the obligee. (*b*) Nor when a deed *inter partes* is in progress of execution, and an alteration is made to meet the wishes of the parties who are about to execute it, does such alteration, if it does not alter the operation of the deed with respect to the parties who have previously executed it, avoid the deed. (*c*)

Merger of a Simple Contract in a Contract under Seal — If after a simple contract or promise has been entered into or made, a contract under seal is executed for the performance of the same act or duty as that stipulated for by the simple contract, the simple contract becomes merged in the higher security, and can no longer be enforced, (*d*) provided the contracts are between the same parties, and the remedies upon them are co-extensive; (*e*) but a contract under seal from some third party, given as a collateral security, will not merge a simple contract or promise; (*f*) nor will a bond or a deed for a debt different from the debt secured by the simple contract. (*g*). And a debt secured by a

(*u*) *Weekes v. Maillard*, 14 East, 572.

(*x*) *Gardner v. Walsh*, 5 El. & Bl. 83; 24 L. J. Q. B. 285.

(*y*) *Markham v. Gonaston*, 9 East, 354, n.; *Hudson v. Revett*, 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123; *Keele v. Wheeler*, 13 L. J. C. P. 170; 8 Sc. N. R. 323; *Enthoven v. Hoyle*, 21 L. J. C. P. 100.

(*z*) *French v. Patton*, 9 East, 351.

(*a*) *Adsetts v. Hives*, 33 Beav. 56.

(*b*) *Matson v. Booth*, 5 M. & S. 226; *Hudson v. Revett*, 2 M. & P. 691.

(*c*) *Doe v. Bingham*, 4 B. & Ald. 676; *Hall v. Chandless*, 12 Moore, 316; 4 Bing. 123.

(*d*) *Schack v. Anthony*, 1 M. & S. 573; *Price v. Moulton*, 10 C. B. 561; 20 L. J. C. P. 102; *Saunders v. Milsome*, L. R. 2 Eq. 573; see *Marryat v. Marryat*, ante. p. * 1234.

(*e*) *Ansell v. Baker*, 15 Q. B. 20; *Sharpe v. Gibbs*, 16 C. B. n. s. 527; *Boaler v. Mayor*, 19 C. B. n. s. 76; 34 L. J. C. P. 230.

(*f*) *Twopenny v. Young*, 3 B. & C. 211; 5 D. & R. 261; *Holmes v. Bell*, 3 Sc. N. R. 479.

(*g*) *Norf. Ry. Co. v. M'Namara*, 3 Exch. 630.

specialty may be further secured by a promissory note, provided such note be given after the execution of the deed.

Judgment Recovered¹ — County Court Judgments. — If there be a breach of contract by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, which is changed into matter of record, and the inferior remedy is merged in the superior, (*h*) provided the cause of action in the two suits is identical. (*i*) If judgment is given for the defendant, such judgment operates as an estoppel against the plaintiff, and precludes him from maintaining a second action for the same cause. (*k*) A judgment, therefore, in the county court is a bar to an action on the same subject-matter in any other court. (*l*)

A judgment recovered against one of two or more [* 1241] joint debtors * or joint contractors may (though unsatisfied) be pleaded in bar to any action brought against the others upon the joint contract, or for the recovery of the joint debt. (*m*) But where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied. (*n*) And if one of such joint debtors was at the time the cause of action arose beyond seas, the recovery of judgment against those who were not beyond seas will not prevent an action being brought against the one who was absent beyond seas, on his return therefrom. (*o*)

¹ U. S. Dig. tit. *Judgment*, IV. sects. 2128–2162; Ann. Dig. tit. *Judgments*.

(*h*) *King v. Hoare*, 13 M. & W. 504, 506; *Buckland v. Johnson*, 15 C. B. 163; 23 L. J. C. P. 264; *Kitchen v. Campbell*, 3 Wils. 308; 2 W. Bl. 827; *Stewart v. Todd*, 16 L. J. Q. B. 327. (*i*) *Langmead v. Maple*, 18 C. B. n. s. 255, *Newington v. Levy*, L. R. 6 C. P. 180; 40 L. J. C. P. 29.

(*l*) *Austin v. Mills*, 9 Exch. 288; 23 L. J. Ex. 42. (*m*) *King v. Hoare*, 13 M. & W. 494; *Kendal v. Hamilton*, 4 Ap. Ca. 504.

(*n*) *King v. Hoare*, 13 M. & W. 504; *Vestry of Bermondsey v. Ramsay*, L. R. 6 C. P. 247; 40 L. J. C. P. 206.

(*o*) 19 & 20 Vict. c. 97, sect. 11.

Judgment recovered in an action upon a bill of exchange given in payment and satisfaction of a sum of money due upon a covenant, is no bar to a subsequent action upon the covenant, unless the judgment has been satisfied. (*p*) Where an action of *assumpsit* was by mistake brought against an administratrix who was not liable to an action at the suit of the plaintiff, and the defendant, instead of denying her liability, pleaded in abatement, and failed to prove her plea, and the plaintiff recovered 1s. damages, it was held that the verdict and judgment thereupon did not bar the plaintiff from maintaining a second action. (*q*)

Where the plaintiff had two demands against the defendant, one on a promissory note and the other for the price of goods sold, and the defendant suffered judgment by default, and, on executing a writ of inquiry, evidence was only given on the first demand, and the plaintiff recovered damages adapted to that amount, the other demand for the goods remaining unsatisfied, it was held that, as there were two distinct demands not in the least blended together, and the plaintiff had failed through inadvertence in proving one of them, he might maintain a second action for it. (*r*) If all matters in difference between a plaintiff and defendant are referred to an arbitrator, the award is no bar to any cause of action that was not inquired into before the arbitrator; (*s*) but it is conclusive as to all matters which it professes to decide. (*t*) An award, however, does not, like a judgment, change the nature of a debt; and, consequently, an action may, notwithstanding an award fixing the amount of the debt, be maintained, on the original consideration, to recover the amount awarded. (*u*)

* Where, however, a claim for unliquidated damage [* 1242] has been referred to arbitration, an award fixing the amount and creating a debt between the parties extinguishes the original demand for unliquidated damage. (*x*) "If a plaintiff offers no evidence in the first action on a particular part of his claim, then a new action may be brought for such part; but if

(*p*) *Drake v. Mitchell*, 3 East, 251.

(*q*) *Godson v. Smith*, 2 Moore, 161.

(*r*) *Seddon v. Tutop*, 6 T. R. 609.

(*s*) *Ravee v. Farmer*, 4 T. R. 146.

(*t*) *Comings v. Heard*, L. R. 4 Q. B.

669.

(*u*) *Allen v. Milner*, 2 C. & J. 47.

(*x*) *Gascoyne v. Edwards*, 1 Y. & J.

19.

he does offer evidence and fails, he is prevented from bringing a fresh action." (y) Where a landlord sued his tenant for rent, and included in his declaration the ordinary money counts, and gave particulars on the count for money had and received of the value of a quantity of stone which had been quarried and carried away by the defendant, but at the trial took a verdict for the rent only, and then brought an action on the case against the defendant for quarrying and carrying away the stone, and delivered particulars in the second action for the same stone exactly corresponding with the particulars delivered on the count for money had and received, it was held that the recovery in the first action was no bar to the second action, as the plaintiff could not under the count for money had and received in that action have recovered compensation for the damage done by the removal of the stone. (z) Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action. (a)

Where an action was brought upon a bill of exchange, and for the price of goods sold and work done, and judgment was recovered for the whole, and after judgment the plaintiff entered a *nolle prosequi* as to part, it was held that this was equivalent to a *retraxit*, and a bar to any future action for the same cause. (b) In every plea of judgment recovered, the defendant is now required to state, in the margin of the plea, the date of the judgment, and if the judgment is in a court of record, the number of the roll (if any) on which it is entered. (c)

Foreign and Colonial Judgments. — "Judgments in foreign courts are not upon the same footing as judgments in our own courts of record. They do not bar or stay an action *ex contractu*." (d) But judgment recovered in a foreign court and payment of the sum recovered is a good bar to the same cause of

(y) *Stafford v. Clark*, 9 Moore, 738.

(z) *Hadley v. Green*, 2 Cr. & Jerv. 376.

(a) *Carter v. James*, 13 M. & W. 137.

(b) *Bowden v. Horne*, 7 Bing. 716.

(c) Reg. Gen. 1 El. & Bl. App. iii.

(d) *Hall v. Odber*, 11 East, 124;

Smith v. Nicolls, 5 Bing. N. C. 208; 2 Smith's L. C. 683-705, 5th ed.; *Plummer v. Woodburne*, 4 B. & C. 625; *Vanquelin v. Bonard*, 33 L. J. C. P. 78; 15 C. B. n. s. 341; *Scott v. Pilkington*, 2 B. & S. 11, 41; 31 L. J. Q. B. 81, 89.

action. (e) A judgment of a foreign or colonial court is conclusive * *inter partes*, (f) unless it can be shown [* 1243] that the court had no jurisdiction, or that it was obtained by fraud, or perhaps that it was given against good faith and natural justice. (g)

Discharge by Death. — Contracts for personal services and contracts founded exclusively on the personal skill and intellectual capacity of the parties die with them, and do not give rise to any liability on the part of their personal representatives; such as contracts by authors to write a book for a publisher, contracts by physicians to cure a patient of a particular disease, contracts by teachers and masters to instruct their pupils or apprentices, promises of marriage, &c. (h) These contracts are strictly personal to the deceased, and the executors cannot be called on to perform them. A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term, that appearing to have been the intention of the parties. (i) And where A was hired by P to serve as farm-bailiff at weekly wages, with other advantages, the service to be determinable by a six months' notice, or payment of six months' wages, and P died during the service, it was held that P's personal representative was not bound to continue A in her service or to pay him six months' wages. (k) So where an intestate had authorized the plaintiff to sell a picture of the intestate, and promised him £100 for his trouble in case he succeeded in selling it, but before any sale had been effected, the intestate died, and after his death the plaintiff sold the picture and claimed the £100, it was held that the authority to sell was revoked by the death of the intestate, and that his administrator was not bound to pay the

(e) *Barber v. Lamb*, 8 C. B. N. s. 95; 408; *Taylor v. Caldwell*, 3 B. & S. 836; 29 L. J. C. P. 234. 32 L. J. Q. B. 164.

(f) *Bank of Australasia v. Nias*, 20 L. J. Q. B. 284; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 575; 30 L. J. Ex. 207.

(g) *Ante*, p. * 1033. (k) *Farrow v. Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326; and see *Whincup v. Hughes*, L. R. 6 C. P. 78, and

(h) *Baxter v. Burfield*, 2 Str. 1266; *Robinson v. Davison*, L. R. 6 Ex. 269; *Chamberlain v. Williamson*, 2 M. & S. 40 L. J. Ex. 172.

£100. (*l*) But the death of the surety does not operate as a revocation of a continuing guarantee. (*m*)

Discharge by Bankruptcy.¹ — An order of discharge in bankruptcy discharges the bankrupt from all debts and liabilities, present or future, certain or contingent (except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise), (*n*) to which the bankrupt is subject at the date of the order of adjudication, or to which he [* 1244] may become * subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of the adjudication. (*o*) The word “liability” is, for the purposes of the act, to include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money’s worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion. But the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and such debt or liability will not then be provable, and will not be barred by

¹ For the effect of a discharge in bankruptcy obtained under the law of 1867 and amendatory acts, see U. S. Rev. Stat. 990, tit. 61, c. 5; or the same with notes, Bump, *Bankruptcy* (9th ed.), 683; see, further, *ib.* c. 15, pp. 266–286; Blumensteil, *Bankruptcy*; Abb. Nat. Dig. tit. *Bankruptcy*; U. S. Dig. tit. *Bankruptcy*; *Crisfield v. State*, 55 Md. 192; *Scott v. Porter*, 93 Pa. St. 38; *Morrison v. Savage*, 56 Md. 142. The decisions at length can be most conveniently consulted in the National Bankruptcy Register.

(*l*) *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 15.

(*m*) *Bradbury v. Morgan*, 31 L. J. Ex. 462; 1 H. & C. 249.

(*n*) See *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122.

(*o*) Bankruptcy Act of 1869, sects. 31, 49.

the order of discharge. (*p*) It is the duty of the court to bring within the act all possible contracts that have been broken, so as to discharge the bankrupt; (*q*) but the order of discharge will not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, (*r*) nor from any debt or liability whereof he has before the commencement of the bankruptcy obtained forbearance by any fraud; (*s*) nor does it release any one who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound or had made any joint contract with him. (*t*) But an order of discharge granted to a debtor who is one of a partnership firm, in his separate bankruptcy or liquidation, releases him from his joint as well as from his separate debts. (*u*) Sureties also remain liable, notwithstanding the bankruptcy of their principal; (*x*) and the landlord's remedy, by way of distress, for the recovery of rent due to him at the time of the bankruptcy, remains unaffected by the certificate, although he has proved for the rent. (*y*) But no distress is to be available for more than a year's rent accrued due prior to the order of adjudication. (*z*) The landlord cannot, of course, prove and *distrain for the same rent; but [*1245] he may distrain for the year's rent, and prove for the balance. (*a*) A covenant that a creditor shall be at liberty to seize after-acquired property of the debtor if he fails to pay the debt, is at an end if the debtor afterward becomes bankrupt, and is discharged from the debt. (*b*) Proof of a debt under an adjudication in bankruptcy is no answer to an action for the debt. (*c*)

In the case of an executory contract, insolvency does not *per*

(*p*) Sect. 31.

(*q*) *Ex parte* Waters, L. R. 8 Ch. 852; see also *Ex parte* Peacock, L. R. 8 Ch. 682.

(*r*) As to the meaning of these words, see *Emma Mining Co. v. Grant*, 17 Ch. D. 122; see also *Hale v. Boustead*, 8 Q. B. D. 453.

(*s*) Sect. 49.

(*t*) Sect. 50.

(*u*) *Ex parte* Hammond, L. R. 16 Eq. 614.

(*x*) *Tuck v. Fyson*, 3 M. & P. 715.

(*y*) *Newton v. Scott*, 9 M. & W. 434;

10 ib. 471; *Phillips v. Shervill*, 6 Q. B. 952.

(*z*) Bankruptcy Act of 1869, sect. 34.

(*a*) *Ex parte* Grove, 1 Atk. 105.

(*b*) *Thompson v. Cohen*, L. R. 7 Q. B. 527; 41 L. J. Q. B. 221.

(*c*) *Spencer v. Demett*, 4 H. & C. 127; L. R. 1 Ex. 123; 35 L. J. Ex. 73.

In such a case, the proper course would seem to be to apply to stay the action, or to apply in bankruptcy to expunge the proof.

se put an end to or alter the contract; but when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract, and may treat it as rescinded. If the purchaser, being insolvent, insists on delivery, the vendor may refuse to deliver except on payment in cash. (*d*)

Operation of Payment of the Dividend. — Payment of a dividend in bankruptcy is not payment of the debt, except as against the debtor himself, and confers no right on the bankrupt or his trustee to call upon the creditor to surrender any collateral security. (*e*)

Liquidation by Arrangement. — A certificate of discharge under a liquidation by arrangement has the same effect in general as has an order of discharge in bankruptcy. (*f*) The debtor will remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement otherwise than by proving his debt and accepting dividends. (*g*)

A discharge is good although the plaintiff relies upon a subsequent promise to pay, and has had no notice of the liquidation, nor has had his name or debt inserted in any list; (*h*) but if the subsequent promise is founded on a good consideration arising after the discharge, the promise may be sued upon. (*i*)

Composition with Creditors.¹ — The provisions of a composition under the Bankruptcy Act, accepted by an extraordinary resolution, will be binding on all the creditors whose [* 1246] names and * addresses (the provisions of this section

¹ See articles by O. F. Bump on Composition in bankruptcy, 3 South. L. Rev. n. s. 507; and on Composition at common law, 4 South. L. Rev. n. s. 639, 805; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Solinger v. Earle*, 12 Cent. L. J. 79, and note by F. W. Peebles, ib. 81.

(*d*) *Morgan v. Bain*, L. R. 10 C. P. 15.

(*e*) *Ewart v. Latta*, 4 Macq. H. L. Cas. 983.

(*f*) Sect. 125, par. (10).

(*g*) Debtors' Act, 1869, sect. 15; see *Ex parte Hemming*, 13 Ch. D. 163.

(*h*) *Heather v. Webb*, 2 C. P. D. 1; see *Elmslie v. Corrie*, 4 Q. B. D. 295, C. A.

(*i*) *Jakeman v. Cook*, 4 Ex. D. 26. But this does not apply to a debtor in bankruptcy who has not paid his composition. See *Ex parte Barrow*, *infra*.

must be strictly complied with), (*k*) and the amount of the debts due to whom, are shown in the statement of the debtor produced to the meeting at which the resolution is passed, as well as those who have voluntarily joined in the resolution, (*l*) but will not affect or prejudice the rights of any other creditor. (*m*) But a creditor whose name and the amount of whose debt are not entered in the statement, and who is therefore not bound by the composition, may nevertheless take advantage of the composition and prove his debt (*n*) while proceedings are pending; but where simple composition resolutions have been registered, and there is no trustee, and proceedings are at an end, the court has no jurisdiction to admit the creditor to proof. (*o*) And the same provision exists as to fraudulent debtors as in the case of liquidation by arrangement. (*p*) If the composition is not paid, the creditors may bring actions for their original debts; (*q*) and if the composition is payable by instalments, and any instalment is unpaid, they may sue for the balance of the original debt remaining unpaid. (*r*) But a resolution by the requisite majority of creditors to accept a composition payable by instalments is a bar to an action for the original debt, brought, before default in payment of the instalments, by a creditor who is bound by the resolution. (*s*) No formal tender of the composition is necessary; it is enough if the debtor is ready to pay, and expresses his willingness to do so. (*t*)

If a debtor disputes his creditor's claim, and forces him to an arbitration, he cannot at the same time compound for his debt, but the creditor may proceed to recover the amount awarded to him in the arbitration. (*u*)

(*k*) *Wilson v. Breslauer*, 2 C. P. D. 314; *Burliner v. Royle*, 5 C. P. D. 354; *Ex parte Laing*, 5 Ch. D. 971.

(*l*) *Campbell v. Im Thurm*, 1 C. P. D. 257; see *Breslauer v. Brown*, 3 Ap. Ca. 673; *Ex parte Laing*, 5 Ch. D. 971.

(*m*) Bankruptcy Act, 1869, sect. 126, par. 7.

(*n*) *Ex parte Carew*, L. R. 10 Ch. D. 308.

(*o*) *Ex parte Lacey*, 16 Ch. D. 131.

(*p*) Debtors' Act, 1869, sect. 15, *supra*.

(*q*) *Edwards v. Coombe*, L. R. 7 C. P. 519; 41 L. J. C. P. 202. So the mere giving of notes as agreed is not binding if they are not paid. *Edwards v. Hancher*, 1 C. P. D. 111.

(*r*) *Halton, In re*, L. R. 7 Ch. 723; *Goldney v. Lording*, L. R. 8 Q. B. 182.

(*s*) *Slater v. Jones*, L. R. 8 Ex. 186.

(*t*) *Hemmingway, Ex parte*, 26 L. T. N. S. 298.

(*u*) *Melhado v. Watson*, 2 C. P. D. 281, C. A.

A secured creditor may decline to take part in composition proceedings, and may realize his security, and then claim a composition upon the unpaid balance of his debt. (x) But a secured creditor who proves under a liquidation for the whole of his debt without deducting the value of his security cannot, after a composition has been accepted, be allowed to set up his security. (y)

If the resolution for a composition is not *bona fide*, [* 1247] if it is not * in the interests of the creditors, but only for the benefit of the debtor, it is not binding on the dissentient minority, and should not be registered. (z)

Want of *bona fides* will not, however, be imputed from the mere deficiency in assets immediately available if the debtor has other *bona fide* claims. (a)

Under sect. 126, the power of the court is limited to cases of fraud, but under sect. 28, the judge has a discretion, and can set aside the composition if he thinks fit. (b)

The acceptance of a composition under the act, although unaccompanied by any reservation of right against other parties, does not operate as a release of a co-debtor or surety. (c) And where a joint and several promissory note was given by two partners to secure a debt of the firm, it was held that the acceptance of a composition on the joint debt was not a satisfaction of the separate liability. (d) So where bankers were joint creditors of two persons in co-partnership with a security by deposit of deeds upon the separate property of one, it was held that the acceptance of a composition by the bank did not discharge the separate security. (e)

The debtor has complete dominion over his property, and full

(x) *In re Bestwick*, 2 Ch. D. 485.

(y) *In re Balbirnie*, 3 Ch. D. 488; see *Couldery v. Bartrum*, 19 Ch. D. 394.

(z) *In re Terrell*, 4 Ch. D. 293; *Ex parte Page*, 2 Ch. D. 323; *Ex parte Russell*, L. R. 10 Ch. 255; *Ex parte Aaronson*, 7 Ch. D. 713; *Ex parte Williams*, 18 Ch. D. 495; *Ex parte Ball*, 20 Ch. D. 670.

(a) *Ex parte Hope*, 9 Ch. D. 398; *Ex parte Early*, 13 Ch. D. 302; *Ex parte Matthews*, 16 Ch. D. 655.

(b) *Ex parte Merchant Co. of London*, 16 Ch. D. 623.

(c) *Megrath v. Gray*, L. R. 9 C. P. 216; *Ex parte Jacobs*, L. R. 10 Ch. 211.

(d) *Simpson v. Henning*, L. R. 10 Q. B. 406.

(e) *Ex parte Marchester & Liverpool District Bank*, L. R. 18 Eq. 249; see, however, *Couldery v. Bartrum*, 19 Ch. D. 394.

power to dispose of it, and a purchaser from him is not bound to inquire as to the payment of instalments. (*f*) It has been held that resolutions for a composition gave an implied authority to the debtor to carry on business in the ordinary way, and to pledge the assets to raise money for that purpose. (*g*)

Effect of a Discharge in Bankruptcy on Debts contracted Abroad. — The English bankruptcy law is binding upon the colonies, and the English courts are bound by its provisions in actions on foreign and colonial as well as on English debts. (*h*) Thus an English certificate in bankruptcy has been held to be a good answer to a debt arising in Calcutta and sued for in the Supreme Court there; (*i*) and the same has been held in Scotland with reference to a debt contracted there. (*k*) So also an English certificate has been held in the English courts to discharge a debt * contracted in Ireland; (*l*) and a [* 1248] debt contracted in England and sued for there, has been held to be discharged by a discharge under a Scotch sequestration, (*m*) or by an Irish certificate, (*n*) or a discharge in Newfoundland. (*o*)

Limitations of Actions.¹ — Where there was a remedy at law and a corresponding remedy in equity supplementing that of the common law, and the legal remedy was subject to a limitation, a court of equity would act by analogy to the statute and impose the same limit. So that as actions of account could not be brought at common law by reason of the statutes of limitation, after six years, so an account in partnership in chancery could

¹ The latest and best American treatise on Limitations is Wood's (1883), which not only collates a great body of recent decisions, but contains also a carefully prepared appendix of the Statutes, including those of England as well as of the several States and Territories. See, also, Angell on Limitations (6th ed. 1876); U. S. Dig. tit. *Limitation of Actions*.

(*f*) *In re Kearley's Contract*, 7 Ch. D. 615.

(*g*) *Ex parte Allard*, 16 Ch. D. 505.

(*h*) *Ellis v. M'Henry*, L. R. 6 C. P. 481. 228; 40 L. J. C. P. 109.

(*i*) *Edwards v. Ronald*, 1 Knapp, 987. P. C. 259.

(*k*) *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462, 486.

(*l*) *Lynch v. M'Kenny*, cited 2 H. Bl. 554.

(*m*) *Sidaway v. Hay*, 8 B. & C. 477,

(*n*) *Ferguson v. Spencer*, 1 M. & G.

(*o*) *Philpotts v. Reed*, 1 B. & B. 294.

not be obtained after the same period. (*p*) The court is now a court of complete jurisdiction, and the rule of the Court of Equity prevails; so that since an *equitable* mortgagee who has within twenty years obtained a decree of foreclosure is entitled to enforce that decree for twenty years, therefore a *legal* mortgagee is entitled to set up such a decree in answer to the statute of limitations. (*q*)

The Statutes of Limitation — Limitation of Actions for the Recovery of Fee-Farm Rents and Money Charged on Land. — By the 3 & 4 Wm. IV. c. 27, (*r*) and 37 & 38 Vict. c. 57, sects. 1, 9, it is enacted that all actions and suits brought for the recovery of rent by persons not being ecclesiastical or eleemosynary corporations (sect. 29 of 3 & 4 Wm. IV. c. 27) shall be brought within twelve years after the right thereto has accrued (see 3 & 4 Wm. IV. c. 27, sects. 3, 5, and 37 & 38 Vict. c. 57, sect. 2) to the plaintiff or to the person through whom he claims. (*s*) And as regards money secured by mortgage, judgment, or lien, or otherwise charged upon, or payable out of land, it is enacted that no action or suit shall be brought for the recovery thereof but within twelve years (*t*) next after a present right to receive such money (*u*) shall have accrued to some person capable of giving a discharge for, or a release of, the same; unless in the mean time some part of the principal money, or some [* 1249] interest thereon, shall have been * paid, (*v*) or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, (*w*) to the person entitled thereto, or

(*p*) *Knox v. Gye*, L. R. 5 H. L. 656; *Noyes v. Crawley*, 10 Ch. D. 31.

(*q*) *Cadmore v. Nelson*, 7 Ap. Cas. 235.

(*r*) Sects. 2, 5, 16, 17, 23, 28, 40 are repealed by the 37 & 38 Vict. c. 57, sect. 9, and similar provisions substituted; the rest of the act remains in force, except that in sect. 18, six years is to be read instead of ten years, and twelve instead of twenty.

(*s*) This does not apply to an action on a covenant to pay a rent charged on land (*Manning v. Phelps*, 10 Exch. 59;

24 L. J. Ex. 62), nor to rents reserved on leases for years; but to ancient rent service, fee-farm rent, and the like (*Grant v. Ellis*, 9 M. & W. 113; *Archbold v. Scully*, 9 H. L. Cas. 360). As to tithes, see *Dean, &c. of Ely v. Cash*, 15 M. & W. 617.

(*t*) 37 & 38 Vict. c. 57, sect. 8.

(*u*) *Sheppard v. Duke*, 9 Sim. 567.

(*v*) i. e. by the person himself liable to pay, see *Harlock v. Ashberry*, *infra*.

(*w*) *Forsyth v. Bristowe*, 8 Exch. 720; *Staley v. Barrett*, 26 L. J. Ch. 321.

his agent, in which case the action or suit is to be brought within twelve years (*x*) after the payment or acknowledgment; and no arrears of rent or of interest in respect of money charged on land, and no damages in respect of such arrears of rent or interest, are, by sect. 42 of 3 & 4 Wm. IV. c. 27, to be recovered by any private person by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. (*y*) So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under sect. 42 of the 3 & 4 Wm. IV. c. 27, the amount to be recovered is limited to six years. (*z*) Where, under a power of sale in a mortgage deed, the property mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the [mortgagee, upon a petition by trustees of the parties beneficially entitled to the fund in court, it was held that they were entitled to the full arrears of interest on the mortgage, the fund after sale having been in their possession, and no recovery by distress, suit, or action being requisite. (*a*) In a suit to foreclose, a mortgagee can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor. (*b*) The words in sect. 8, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing an acknowledgment. (*c*) A simple foreclosure action is not an action to recover the money secured, but is an action to recover

(*x*) 37 & 38 Vict. c. 57, sect. 8.

(*y*) An acknowledgment contained in a deed speaks of the time of the execution of the deed. *Jaynes v. Hughes*, 24 L. J. Ex. 116. An answer to a bill in equity may be an acknowledgment. *Goode v. Job*, 28 L. J. Q. B. 1; 1 Ell. & Ell. 6. As to the meaning of the words, see *infra*.

(*z*) *Archbold v. Scully*, 9 H. L. Cas. 360.

(*a*) *Edmunds v. Waugh*, L. R. 1 Eq. 418; 35 L. J. Ch. 234; but see *Mason v. Broadbent*, 33 Beav. 296; and *In re Stead's Estates*, 2 Ch. D. 713.

(*b*) *Round v. Bell*, 31 L. J. Ch. 127; 30 Beav. 221.

(*c*) *Chinnery v. Evans*, 11 H. L. Cas. 115.

the land, and is therefore within sect. 1 of 37 & 38 Vict. c. 57, and not within sect. 8. (*d*)

Where a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired as [* 1250] good a title * under the statute as if a conveyance had been made to him, can restore the old title. (*e*)

Where any prior mortgagee or incumbrancer shall have been in possession of land, or the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt, although such time may have exceeded the said term of six years. And the effect of the 3 & 4 Wm. IV. c. 27, sect. 42, is qualified by the 3 & 4 Wm. IV. c. 42, sect. 3, which enacts that actions for rent on an indenture of demise, and actions of covenant or debt on any bond or specialty, must be brought within twenty years after the accrual of the cause of action; so that although the land cannot be charged with more than six years' arrears of rent or interest, (*f*) yet if there be a covenant for the payment thereof, twenty years' arrears may be recovered by action on the covenant. (*g*)

Where a mortgage deed had been executed in 1830 to secure a principal sum and interest, with a covenant therein for the payment of the interest, and the mortgagor died, and his co-heirs sought to redeem, and there was a long arrear of interest unpaid, it was held that six years' arrears only were a charge upon the land under the 3 & 4 Wm. IV. c. 27, s. 42, but that twenty years' arrears might be recovered by action on the covenant under the 3 & 4 Wm. IV. c. 42, sect. 3, and that if the heir of

(*d*) *Harlock v. Ashberry*, 18 Ch. D. 229. six years, see *Humfrey v. Gery*, 7 C. B. 567; *Francis v. Grover*, 5 Hare, 39.

(*e*) *In re Alison*, 11 Ch. D. 284; (*g*) *Paget v. Foley*, 3 Sc. 120; *Strachan v. Thomas*, 12 Ad. & E. 556; *Hunter v. Nockolds*, 18 L. J. Ch. 407.

(*f*) As to arrears of fee-farm rent or of rent-charge being recoverable only for

the mortgagor comes to redeem, the personal liability upon the covenant may be tacked on to the mortgage, and payment of all the arrears for twenty years be exacted as the price of the redemption. (h) The plaintiff replevied a distress for rent, saying that the defendant's title to a fee-farm rent was barred by discontinuance of receipt of rent, — payments of rent from 1812 to 1872 not being paid by the terre-tenant. In 1812, the then owner conveyed to the plaintiff's predecessor, but continued to pay the rent till 1872. The persons receiving the rent were ignorant of the change of ownership. In 1872, the defendant, being the person to receive the rent, demanded it of the plaintiff and distrained. It was held that the defendant could distrain, for there was no discontinuance of * receipt [* 1251] of rent, for that the statute only applies where the person who ought to receive the rent has knowledge of its non-payment; and also because under the circumstances a presumption arose that the vendor in 1812 agreed to indemnify the purchaser against the rent, and therefore the payments were made by the vendor on behalf of the plaintiff and her predecessors in title. (i)

An order of absolute foreclosure vests the *beneficial* title for the first time in the mortgagee, so that an action brought within twenty years was held to be in time, although more than twenty years had elapsed since the *legal* title was conveyed. (k)

Rights of Mortgagees. — The 7 Wm. IV. & 1 Vict. c. 28, provides that it shall be lawful for any person claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twenty years (now twelve years, see 37 & 38 Vict. c. 57, sect. 9) next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit, shall have first accrued. (l) A foreclosure action is an action for the recovery of land, and is within

(h) *Elvy v. Norwood*, 21 L. J. Ch. 716.

(i) *Adnam v. The Earl of Sandwich*, 2 Q. B. D. 485.

(k) *Heath v. Pugh*, 6 Q. B. D. 345, C. A.

(l) *Doe v. Massey*, 17 Q. B. 381; 20 L. J. Q. B. 434.

this statute, and a payment must be a payment of principal or interest, and must be made by the mortgagor himself, or some person bound to pay on his behalf. (*m*) Where in ejectment for a house by mortgagee against mortgagor it was proved that in 1847 a declaration in ejectment had been served on the mortgagor, who was in possession, and that judgment was signed, and that shortly afterward the mortgagor ceased to have possession of the land (which had been mortgaged with the house), but retained possession of the house, it was held that there was no evidence of possession by the mortgagee, or of the creation of a new tenancy under him in 1847, so as to prevent the operation of the statute. (*n*)

Limitation of Actions for the Recovery of Rent, and Specialty and Simple Contract Debts.—By the 3 & 4 Wm. IV. c. 42, sect. 3, it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within TWENTY years after the cause of such actions or suits, but not

after, except where the time for bringing the action is [* 1252] specially limited by statute; *and by the 21 Jac. I.

c. 16, sect. 3, and the 19 & 20 Vict. c. 97, sect. 9, all actions of detinue, trover, and replevin, for taking away of goods or cattle; all actions of account and for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions upon the case; all actions of debt grounded upon any lending or contract without specialty; and all actions of debt for arrearages of rent, (*o*) and upon an award where the submission is not by deed, (*p*) must be commenced and sued within six years next after the cause of such action or suit, and not afterward; and no claim in respect of a matter which arose more

(*m*) *Harlock v. Ashberry*, 19 Ch. D. 539.

(*n*) *Thorp v. Facey*, 35 L. J. C. P. 349.

(*o*) *Leigh v. Thornton*, 1 B. & Ald. 627. This applies only to rent reserved on a demise without deed. *Freeman v.*

Stacey, Hutt, 109. Rents reserved upon a lease under seal, rent-charges founded upon a deed, or a reservation of rent upon a fee simple by deed, are not touched by this statute.

(*p*) 3 & 4 Wm. IV. c. 42, sect. 3.

than six years before the commencement of such action or suit is enforceable by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

What are Specialty Debts. — An action founded on the provisions of an act of parliament, such as an action for calls, is an action on a specialty. (*q*) But an action of debt for a penalty due under a by-law founded on the charter of a chartered company is an action of debt grounded upon a contract without specialty, and is barred by the statute if not commenced within six years after the penalty becomes due, although the charter is under the Great Seal and is matter of record; for the liability springs out of the consent of the party to become a member of the company and obey the by-laws, which is in effect a contract without specialty. (*r*) If one party is indebted to another by simple contract, and the simple contract debt is recited or acknowledged in a deed, the debt does not become a specialty debt, unless the terms of the deed are such as to raise between the parties an implied covenant for the payment of the money. (*s*) A bond executed in India cannot be treated as a simple contract. (*t*)

Of the Exception in Favor of Persons laboring under Temporary Disabilities. — If the person entitled to any such action is at the time the action accrues within the age of twenty-one years, or *feme covert*, or *non compos mentis*, such person is at liberty to bring the same actions so as they are commenced within the *time of limitation prescribed by [*1253] the respective acts, after the coming to, or being of, full age, discover, or of sound mind. (*u*) By sect. 5 of the Real Property Limitation Act, 1874, no person who at the time the right of action accrued was under disabilities, can bring an action except within thirty years, although he has remained

(*q*) *Cork & Bandon Ry. Co. v. Goode*, 13 C. B. 826; 22 L. J. C. P. 198; L. J. Ch. 249.

Shepherd v. Hills, 11 Exch. 67.

(*r*) *The Master-Warden of the Tobacco-Pipe Makers v. Loder*, 20 L. J. Q. B. 414; 16 Q. B. 765.

(*s*) *Ivens v. Elwes*, 3 Drew. 25; 24

L. J. Ch. 249.

(*t*) *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

(*u*) 21 Jac. I. c. 16, sect. 7; 3 & 4 Wm. IV. c. 42, sect. 4.

under such disabilities, or although six years have not expired since he had ceased to be under disabilities.

With reference to married women, it should be observed that their separate property vested in trustees may be bound by their contracts, and the debts so created, being debts payable out of funds held in trust for their separate use, are not barred by the statute. (x) But, on the other hand, it should seem that if a married woman having separate property acquires a right of action with respect to it under the Married Woman's Property Act, the statute of limitations begins to run against her just as if she were a *feme sole*. Formerly, imprisonment or absence beyond sea had the effect of extending the period of limitation; but by the 19 & 20 Vict. c. 97, sect. 10, and the 37 & 38 Vict. c. 57, sect. 4, no person shall be entitled to any time within which to commence an action or suit beyond the periods fixed by these statutes, by reason only of his being absent beyond seas or in imprisonment at the time the cause of action or suit accrued. (y) And now by the Real Property Limitation Act, 1874, (z) "The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims." Formerly, the absence beyond sea of any of several joint defendants prevented the statute from running as against those who were resident in England. (a) But this has been altered by the 19 & 20 Vict. c. 97, sect. 11. Where a cause of action has once accrued, and the statute has begun to run, there being then a capacity of suing and of being sued, the time of limitation continues to run, and is not stopped by the circum-

(x) Norton v. Turvill, 2 P. Wms. 144; Hodgson v. Williamson, 15 Ch. D. 87.

(y) This section is retrospective. Pardo v. Bingham, L. R. 4 Ch. 735; 39 L. J. Ch. 170, following Cornill v. Hudson, 8 El. & Bl. 429. Absence beyond the seas does not affect mortgagor re-

deeming (see Kinsman v. Rouse, 17 Ch. D. 104), nor do any of the other exceptions (see Foster v. Patterson, 17 Ch. D. 132).

(z) 37 & 38 Vict. c. 57, sect. 4.

(a) Fannin v. Anderson, 7 Q. B. 811; Towns v. Mead, 16 C. B. 134. But see the 15 & 16 Vict. c. 76, sect. 18.

stance of the death of one of the parties, and delay in taking out administration. (b) Any portion of time in which the parties are * under disabilities occurring after the [* 1254] time has begun to run must nevertheless form part of the period of limitation. (c)

Of the Commencement of the Time of Limitation. — The time of limitation begins to run from the period of the breach of contract and the accrual of the cause of action, and not from the time of the making of the contract. If, therefore, a thing is to be done on the happening of a contingent or uncertain event, there can be no cause of action and no limitation of time until the event has happened. (d) Where a bond is conditioned for the performance of acts to be done successively in a series of years, a new cause of action arises with each omission to do the act at the proper time; and if the plaintiff can show any breach within twenty years, he is entitled to recover. (e) In the case of a solicitor's bill for the costs of an action, the statute does not begin to run so long as the action is pending (f); and although *prima facie* the termination of a suit is when judgment is given in the court in which the action is commenced; yet, when an appeal is brought, and the same solicitors continue to conduct the suit on appeal, that is a continuation of the original suit, and what *prima facie* was a termination of the contract ceases to be so. (g) If a contract has been broken, and has given rise to a cause of action, and this cause of action is suspended by a subsequent agreement between the parties, which is also broken, and the creditor is remitted to his original right of action, the time of limitation will run from the period of the breach of the second agreement, and not from the time of the breach of the original contract. (h) When a debt has been contracted on

(b) Penny v. Brice, 18 C. B. n. s. 393.

(c) Rhodes v. Smethurst, 4 M. & W. 61; Freake v. Cranefeldt, 3 Myl. & Cr. 499.

(d) Savage v. Aldren, 2 Stark. 232; Fenton v. Emblers, 1 W. Bl. 353; Bill v. Lake, Hetl. 138; Shutford v. Borough, Godb. 437; Tuckey v. Hawkins, 4 C. B. 664; 16 L. J. C. P. 201.

(e) Amott v. Holden, 22 L. J. Q. B. 19; Blair v. Ormond, 20 ib. 452; White v. Corbett, 1 El. & El. 692; 28 L. J. Q. B. 228.

(f) Whitehead v. Lord, 21 L. J. Ex. 239.

(g) Harris v. Quine, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331.

(h) Irving v. Veitch, 3 M. & W. 110.

credit, no cause of action arises until the period of credit has expired. (i) If a debt is to be paid by instalments, and it is provided that, in case default is made in payment of any one instalment when due, the whole debt shall be immediately recoverable, the entire cause of action accrues upon the first default, and the period of limitation begins to run therefrom. (k) If an action is brought for the recovery of the consideration paid for a void annuity, the time of limitation runs from the period when the grantee elected to treat the annuity as void, and not from the time of the payment of the consideration and the making of the grant. (l)

[* 1255] * It is a general rule that, where there has once been a complete cause of action, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight and refused acceptance, the cause of action is complete, and the statute begins to run, upon the refusal of acceptance, and no new cause of action arises upon the refusal of payment. This rule, however, is not universal; for in cases where a man undertakes to do an act upon a future day, and, before the day arrives, disables himself from performing the act or positively and absolutely refuses to be bound by or perform his contract, and, so to speak, declares off the bargain himself and absolves the opposite party, it is in the option of such party at his election to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and to sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the option of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter action. (m) So if a person intrusted with a thing for safe custody wrongfully parts

(i) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(k) *Hemp v. Garland*, 4 Q. B. 524.

(l) *Cowper v. Godmond*, 3 M. & Sc. 219; 9 Bing. 753.

(m) *Hochster v. De la Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455; *Frost v. Knight*, L. R. 7 Ex. 111; 41 L. J. Ex.

78.

with it, the owner may at his election either sue for the wrongful parting with the property, or he may wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor, agreeably to the maxim, *Qui dolo desiit possidere pro possidente damnatur.* (n)

Contingent and Conditional Liabilities. — Whenever the liability of the defendant is dependent upon some contingency, or the happening of some uncertain event, the cause of action does not arise until the contingency has happened. If a man has promised to pay a sum of money as soon as his circumstances enable him to do so, the time of limitation runs from the period of his being able to pay. (o) If a surety guarantees the payment of a debt by his principal, the time of limitation runs from the period of the principal's making default in payment. (p) If a surety sues his principal upon the implied contract of the principal to indemnify * the surety, the time [* 1256] allowed for bringing the action runs from the time that the surety actually paid what the principal was bound to pay, and not from the time that he became liable to pay. (q) If one man agrees to indemnify another against costs, the cause of action accrues at the time the costs are actually paid by the party who is to be indemnified, and not at the time that the costs are incurred. (r) In the case of co-sureties suing each other for contribution, the time of limitation runs from the period when the co-surety was called upon to pay more than his own share of the common liability, and not from the time that the principal for whom they became responsible made default. "If, therefore, the co-surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the time of limitation will not run from the original

(n) *Reeve v. Palmer*, 5 C. B. n. s. 84, 91; 27 L. J. C. P. 327; 28 ib. 168; *Wilkinson v. Verity*, L. B. 6 C. P. 206; 40 L. J. C. P. 141.

(o) *Waters v. Earl Thanet*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452.

(p) *Humphreys v. Jones*, 14 M. & W. 1.

(q) *Reynolds v. Doyle*, 2 Sc. N. R. 46.

(r) *Collinge v. Heywood*, 9 Ad. & E. 633.

payment by the co-surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the co-surety has paid more than his share, and has in consequence thereof a right of action for contribution." (s)

When a demand or request of performance of a contract is a condition precedent to a right of action for non-performance, the time of limitation runs from the period of the making of the request or demand. (t) But it is otherwise if no demand or request is necessary to give rise to a right of action. (u) When a bill of exchange or a promissory note has been made payable at sight, the time of limitation runs from the time when the bill or note is presented for payment. (v) If a promissory note is made payable two years after demand of payment, the time of limitation begins to run two years after a demand has been proved to have been made. (x) But if the note is payable on demand simply, then, as no demand is necessary before bringing an action (the service of a writ upon the maker of the note being considered a sufficient demand), the time of limitation runs from the period of the making of the note. (y) The same rule prevails with regard to a loan of money payable on demand. (z) But where the plaintiff having agreed to lend the defendant a sum of money gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it, and the cheque was not paid by the plaintiff's bankers till some days [* 1257] later, it was held that, in * an action for the money so lent, the statute only ran from the time of the payment of the cheque by the plaintiff's bankers. (a) And where a promissory note payable on demand was given to a banker to secure future advances, it was held that the statute did not begin to run until the account was closed and the credit determined. (b)

(s) *Davies v. Humphreys*, 6 M. & W. 169; *Huntley v. Sanderson*, 1 Cr. & M. 480; see also *Ex parte Snowden*, 17 Ch. D. 44.

(t) *Buckler v. Moor*, 1 Mod. 89; *Topham v. Braddick*, 1 Taunt. 572; *Webb v. Martin*, 1 Lev. 48; *Mills v. Borthwick*, 35 L. J. Ch. 31.

(u) *Collins v. Benning*, 12 Mod. 444; *Emery v. Day*, 1 C. M. & R. 248.

(v) *Holmes v. Kerrison*, 2 Taunt. 323.

(x) *Thorpe v. Booth*, R. & M. 388.

(y) *Norton v. Ellam*, 2 M. & W. 461; *Waters v. Earl Thanet*, 2 Q. B. 769.

(z) *Jackson v. Ogg*, 1 Johns. 397; 5 Jur. n. s. 976.

(a) *Garden v. Bruce*, L. R. 3 C. P. 300; 37 L. J. C. P. 112.

(b) *Hartland v. Jukes*, 1 H. & C. 673; 32 L. J. Ex. 162.

Unknown and Undiscovered Breaches of Contract. — It is said to be a general rule of law that the time of limitation runs from the period when the contract was broken, and not from the time that knowledge of the breach of contract first came to the plaintiff, nor from the time that any particular or special damage may have accrued or been discovered, (*c*) whether the breach of contract was patent and discoverable, or whether it was concealed and undiscoverable, and whether there had been laches or neglect on the part of the plaintiff in not finding out that the contract had been broken and that the cause of action had accrued, (*d*) or whether it was physically impossible for the plaintiff to know of the breach until he had sustained the resulting damage. And it was held at common law that, even if the defendant had resorted to fraudulent contrivances to prevent the plaintiff from knowing of the defendant's breach of contract, and of the accrual of the cause of action, until after the time of limitation had expired, the perpetration of the fraud did not prevent the defendant from availing himself of the benefit of the statute. (*e*)

It has also been held that, if a person professing to be skilled in the investment of money undertakes for hire to invest a sum of money on good security, and receives the money, and, acting with gross carelessness, invests it in bad security, but the worthlessness of the security is not known to the promisee for more than six years after the making of the promise, when the interest of the money ceases to be paid by some third party for the first time, the promisee is barred of all remedy by the statute. (*f*) This construction of the statute of limitations, which deprives a man of redress after the expiration of six years, when the act

(*c*) *Battley v. Faulkner*, 3 B. & Ald. 288.

(*d*) *Granger v. George*, 5 B. & C. 152; 7 D. & R. 732; *Denys v. Shuckburgh*, 4 Y. & C. 42; see *Angus v. Dalton*, 6 Ap. Cas. 740.

(*e*) *Imp. Gas Co. v. Lond. Gas Co.*, 10 Exch. 39; 23 L. J. Ex. 303. Lord Mansfield, however, thought that there might be cases of fraud which would preclude a defendant from relying on the

statute. *Bree v. Holbech*, 2 Doug. 655; and see now *Gibbs v. Gould*, *post*, p. * 1258, where *Imp. Gas Co. v. London Gas Co.*, *supra*, is overruled, Holker, L. J., diss.

(*f*) *Howell v. Young*, 5 B. & C. 259; 8 D. & R. 21; *Whitehead v. Howard*, 2 B. & B. 375; *Short v. McCarthy*, 3 B. & Ald. 626; *Sims v. Brutton*, 20 L. J. Ex. 41; 5 Exch. 802.

causing the damage was unknown to him, may seem to [* 1258] be harsh, * and contrary to the ordinary principles of law. (g) Formerly, the acceptance and receipt of money under the circumstances above mentioned, and its fraudulent misapplication, or its investment on bad security, through the gross carelessness of the receiver and undertaker of the duty, was in most cases held in equity to amount to a breach of trust. (h) But it seemed open to doubt whether this construction would prevail. (i) It has, however, now been held, following the decisions of the Court of Chancery for many years, that in an action for damages for false representation where the statute is set up as an answer, the plaintiff may reply that he did not discover, and had not reasonable means of discovering, the fraud within the six years. (k)

Acknowledgments of Deeds and Specialties extending the Period of Limitation.¹ — By the 3 & 4 Wm. IV. c. 42 (sect. 5), it is enacted that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal sum or interest due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability, (kk) or the party making such acknowledgment be at the time of

¹ On the topics treated in this and the six paragraphs next following, see article on Acknowledgment of outlawed debt, 23 Alb. L. J. 104; Norton v. Shepard, 48 Conn. 141; Kallenbach v. Dickinson, 100 Ill. 427; Rhind v. Hyndman, 54 Md. 527; Pool v. Bledsoe, 85 N. C. 1; Flemming v. Flemming, ib. 127; Riggs v. Roberts, ib. 151; Shaw v. Burney, 86 N. C. 331; Wesner v. Stein, 97 Pa. St. 322.

(g) Bonomi v. Backhouse, Ell. Bl. & Ell. 659; 28 L. J. Q. B. 378.

(h) Smith v. Pococke, 2 Drew. 197; Blair v. Bromley, 5 Hare, 542.

(i) See the Supreme Court of Judicature Act, sect. 25 (2), by which the Statutes of Limitation are made inap-

plicable to an express trust. See *post*, p. * 1267.

(k) Gibbs v. Gould, 8 Q. B. D. 296; 9 Q. B. D. 59, C. A.

(kk) See 19 & 20 Vict. c. 97, sect. 10, as to the person entitled being beyond the seas.

making the same beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas ; and the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute. Any acknowledgment amounting to a clear admission of the specialty debt will be a bar to the setting-up of the statute. (*l*) A recital in a deed of a prior mortgage deed assigning certain property as the security for the payment of a mortgage debt is not necessarily an acknowledgment of the mortgage debt within the meaning of the statute. (*m*) But a recital in a mortgage deed of the payment of interest, up to the date thereof, made within twenty years of action brought, takes the case out of the statute. (*n*)

*** Acknowledgments of, and Promises to pay, Simple** [* 1259]
Contract Debts. — By the 9 Geo. IV. c. 14, sect. 1, it is enacted that in actions of debt or upon the case grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the statute of limitations ; and that no person shall be deprived of the benefit of the act, unless the acknowledgment or promise shall be made by a writing signed by the party chargeable thereby, or by his duly authorized agent ; (*o*) but nothing contained in the act is to alter, take away, or lessen the effect of any payment of any principal or interest by any person whatever. Since this statute, therefore, there must be either a written acknowledgment, signed as therein mentioned, or an act done which is equivalent, in contemplation of law, to part payment of principal, or payment of interest. (*p*) An infant is of sufficient capacity to make an acknowledgment in writing, under this statute, of a debt due for necessities ; and the acknowledgment will be evidence against him for six years after it has been made. (*q*)

(*l*) *Moodie v. Bannister*, 28 L. J. Ch. 881 ; 4 Drew. 432.

(*m*) *Howcutt v. Bonser*, 3 Exch. 499 ; R. 48.

18 L. J. Ex. 262.

(*n*) *Forsyth v. Bristowe*, 8 Exch. 721. 185 ; 24 L. J. Q. B. 62.

(*o*) 19 & 20 Vict. c. 97, sect. 13.

(*p*) *Williams v. Griffiths*, 2 C. M. &

(*q*) *Willins v. Smith*, 4 Ell. & Bl.

Of the Form and Requisites of the Acknowledgment. — Any writing signed by a defendant or his authorized agent, admitting that a sum of money is due upon a bond or deed or simple contract, at the time of the making of the admission, will revive the remedy upon the contract, although it contains, upon the face of it, no express promise to pay or to make satisfaction. But if there is no express promise to pay, the acknowledgment must be such that a promise to pay may be inferred in fact. (r) In the case of simple contract debts, it was at one time held that a “positive refusal to pay was an acknowledgment. The tide of authorities, however, changed: and the courts began to require the acknowledgment to be such as to justify them in inferring therefrom a promise to pay.” (s) The insertion of a debt, therefore, in a petition to the Court of Bankruptcy is no acknowledgment of the debt within the statute, as it rebuts the presumption of a promise to pay it. (t) So the insertion of a debt in the schedule to a deed of insolvency, executed for the purpose of administering the estate of a debtor, is not, although the schedule is verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the statute of limitations, so as to entitle the creditor to prove for [* 1260] the debt * under a subsequent administration of the debtor’s estate in bankruptcy. (u) If there is an acknowledgment of the debt, with a suggestion as to the most convenient mode of payment, (x) or a mere acknowledgment without any accompanying observations, that will be sufficient; “because,” observes Parke, B., “from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, you may infer a promise to pay on request.” (y) An admission which stops short of being an admission of a debt being due will not suffice for the maintenance of an action: (z) such as a letter say-

(r) Mitchell’s case, L. R. 6 Ch. 822, 828.

(s) Linley v. Bonsor, 2 Sc. 404; 2 Bing. N. C. 241; Cornforth v. Smithard, 5 H. & N. 13; 29 L. J. Ex. 228.

(t) Everett v. Robertson, 1 Ell. & Ell. 19; 28 L. J. Q. B. 24.

(u) Topping, *Ex parte, in re Levey*, 34 L. J. Bk. 44.

(x) Evans v. Simon, 9 Exch. 285; 23 L. J. Ex. 16.

(y) Smith v. Thorne, 18 Q. B. 143; 21 L. J. Q. B. 201; Dabbs v. Humphries, 10 Bing. 449; Holmes v. Mackrell, 3 C. B. n. s. 794.

(z) Collinson v. Margesson, 27 L. J. Ex. 305.

ing, "Doubtless I did owe the money, but I have already paid it;" (a) or "I admit the debt, but I have got a set-off;" or "The debt is barred by the statute of limitations." (b) Asking for an account is equivalent to a promise to pay. (c) If a man admits that a signature to an accountable receipt is his signature, but at the same time says it was never worth anything, this is no admission or acknowledgment. (d) Whenever the acknowledgment is accompanied by a repudiation of liability, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails. (e)

Where the defendant's promise to pay is qualified and conditional, the condition must be shown to be accomplished, and the promise to have become absolute. (f) If the defendant has promised to pay as soon as he is able, or as soon as his circumstances will permit, his ability to pay must be shown before he can be made liable upon this promise. (g) The amount of the debt may be shown by parol testimony, and need not appear upon the face of the writing; (h) and if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute. (i) If in

(a) *Bryan v. Horseman*, 5 Esp. 81; *Birk v. Guy*, 4 ib. 184.

(b) *Swan v. Sowell*, 2 B. & Ald. 761; *Boydell v. Drummond*, 2 Campb. 161; *Francis v. Hawkesley*, 28 L. J. Q. B. 370; 1 EL & EL. 1052.

(c) *Quincey v. Sharpe*, 1 Ex. D. 72; *Skeet v. Lindsay*, 2 Ex. D. 314.

(d) *Roweroft v. Lomas*, 4 M. & S. 459.

(e) *Tanner v. Smart*, 6 B. & C. 606; *Brigstocke v. Smith*, 1 Cr. & M. 485; *A'Court v. Cross*, 3 Bing. 329; *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J. Ex. 315.

(f) *Parke, B., Humphreys v. Jones*, 14 M. & W. 3; *Waters v. Earl of Thanet*, 2 Q. B. 759.

(g) *Edmunds v. Downes*, 2 Cr. & M. 459; *Haydon v. Williams*, 7 Bing. 167; *Irving v. Veitch*, 3 M. & W. 112; *Mey-*

erhoff v. Froerlich, 3 C. P. D. 333; 4 C. P. D. 63, C. A.

(h) *Williams v. Griffith*, 3 Exch. 343.

(i) *Gardner v. M'Mahon*, 3 Q. B. 568; *Cheslyn v. Dalby*, 4 Y. & C. 238. Instances of insufficient acknowledgments will be found in *Morrell v. Frith*, 3 M. & W. 403; *Poynder v. Bluck*, 5 Dowl. P. C. 570; *Hart v. Prendergast*, 14 M. & W. 741; 15 L. J. Ex. 224; *Edmonds v. Goater*, 21 L. J. Ch. 290; *Fearn v. Lewis*, 6 Bing. 349; *Routledge v. Ramsay*, 8 Ad. & E. 221; *Whippy v. Hillary*, 3 B. & Ad. 400; *Spong v. Wright*, 9 M. & W. 629; *Martin v. Knowles*, 1 N. & M. 422; *Cawley v. Furnell*, 20 L. J. C. P. 197; *Parmiter v. Parmiter*, 3 De G. F. & J. 461; 30 L. J. Ch. 508; *Richardson v. Barry*, 29 Beav. 22; *Hindmarsh, In re*, 1 Drew. & Sm.

[*1261] an *account rendered, there are two perfectly distinct items, not in any way connected together, and forming no part of one continuous transaction, a signed acknowledgment as to one of them will not take the other out of the operation of the statute. (*k*)

Lost Acknowledgments. — Where a written acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment was permitted to be given. (*l*)

Acknowledgment by One of Several Joint Contractors, or by Executors or Administrators. — Some doubt seems to have been entertained as to whether an acknowledgment in writing, signed by the defendant, of his liability upon a bill of exchange or promissory note, will inure to the benefit of a subsequent indorsee or holder. It is apprehended that it would do so. (*m*) But it is clear that an admission by the debtor of his liability to a particular indorsee or holder of the bill may be made under circumstances which do not extend the benefit of the admission to any other party than the one to whom it is made. (*n*) Formerly, an acknowledgment of a debt by one of several joint debtors operated as an acknowledgment by all, and was evidence of a promise on behalf of all; but such acknowledgments and promises do not now deprive the others, who are no parties to the acknowledgment or promise, of the benefit of the statute. (*o*) If one of several joint debtors promises by writing, signed by him, to pay his proportion of the joint debt, this is an additional new contract; and if the creditor sues him upon the original joint contract for the entire debt, and that action is defeated by a

- 129; *Buckmaster v. Russell*, 10 C. B. 225; *Lee v. Wilmot*, L. R. 1 Ex. 364; *n. s.* 745; *Cockrill v. Sparke*, 1 H. & C. 35 L. J. Ex. 175; 4 H. & C. 469; *Chasemore v. Turner*, L. R. 10 Q. B. 500; 699; 32 L. J. Ex. 118; *Bush v. Martin*, 2 H. & C. 311; 33 L. J. Ex. 17; *Lowndes v. Garnett and Moseley Gold Mining Co.*, 33 L. J. Ch. 418. Instances of sufficient acknowledgments will be found in *Collis v. Stack*, 1 H. & N. 605; 26 L. J. Ex. 138; *Bird v. Gammon*, 3 Bing. N. C. 883; *Sidwell v. Mason*, 2 H. & N. 306; 26 L. J. Ex. 407; *Colledge v. Horne*, 3 Bing. 119; *Gardner v. M'Mahon*, 3 Q. B. 561; *Dodson v. Mackey*, 8 Ad. & E. 225; *Lee v. Wilmot*, L. R. 1 Ex. 364; 35 L. J. Ex. 175; 4 H. & C. 469; *Chasemore v. Turner*, L. R. 10 Q. B. 500; *Wilby v. Elgee*, L. R. 10 C. P. 497.
- (*k*) *Robarts v. Robarts*, 1 M. & P. 489; *Rothery v. Munnings*, 1 B. & Ad. 15; *Phillips v. Broadley*, 9 Q. B. 744.
- (*l*) *Haydon v. Williams*, 7 Bing. 163.
- (*m*) *Gale v. Capern*, 1 Ad. & E. 104; 3 N. & M. 863; *Cripps v. Davis*, 12 M. & W. 165.
- (*n*) *Easterly v. Pullen*, 1 Stark. 186.
- (*o*) 9 Geo. IV. c. 14, sect. 1.

plea of the statute of limitations, he may then resort to the new contract for the recovery of the defendant's proportion of the joint debt. (*p*)

*** Of the Party to whom the Acknowledgment is to** [* 1262] **be made.** — It has been held that it is not necessary, except in the case of actions on mortgage deeds or mortgage bonds, (*q*) that the acknowledgment should be made to the creditor himself, or to his agent, but that a letter acknowledging the debt, addressed to a third party, or a signed acknowledgment in writing, not addressed to any one, will be sufficient. (*r*) The acknowledgment must be shown to have been written or signed before the commencement of the action. Where it is not made until after action is brought, it cannot prevent the operation of the statute. (*s*) If there is no date to the writing, the date may be supplied by oral testimony. (*t*)

Exemption of the Promise or Acknowledgment from Stamp Duty. — Promises to pay debts barred by the Statute of Limitations may, by the 9 Geo. IV. c. 14, sect. 8, be given in evidence, unstamped, for the mere purpose of proving an acknowledgment of the debt, but not for the purpose of proving the debt itself, or the contract or promise which gives rise to the cause of action. (*u*) The exemption extends only to those written instruments which, but for the exemption, would require an agreement stamp. An unstamped or wrongly stamped promissory note cannot, consequently, be given in evidence to establish the promise or acknowledgment. (*x*)

Part Payment of a Principal Debt, or Payment of Interest thereon. — The proviso in the 9 Geo. IV. c. 14, sect. 1, declaring that nothing contained in the act is to alter, take away, or lessen the effect of any payment of principal or interest, takes the case of payment of principal or interest altogether out of the opera-

(*p*) *Lechmere v. Fletcher*, 1 Cr. & M. 636.

(*q*) *Forsyth v. Bristowe*, 8 Exch. 721 ; 22 L. J. Ex. 255.

(*r*) *Mountstephen v. Brooke*, 3 B. & Ald. 141 ; *Peters v. Brown*, 4 Esp. 46 ; *Clark v. Hougham*, 2 B. & C. 149 ; Hal-

liday v. Ward, 3 Campb. 32 ; *Clarke v. Hooper*, 4 M. & Sc. 353.

(*s*) *Bateman v. Pinder*, 3 Q. B. 576.

(*t*) *Edmunds v. Downes*, 2 Cr. & M. 459.

(*u*) *Morris v. Dickson*, 4 Ad. & E. 845.

(*x*) *Jones v. Ryder*, 4 M. & W. 35.

tion of that statute, so as to enable payment to be proved as before the statute was passed. (y) In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it and treated it as a part payment only, will not bring it within the statute. (z) If it stands ambiguous whether the payment be a part payment of an existing debt, more being admitted to be due, or whether it was intended by the party to satisfy the whole of [* 1263] the demand * against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation. (a) If the payment is accompanied by declarations and statements, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit. (b) If there be two debts, — one barred by the statute and the other not barred, — a general payment on account will not revive a debt barred by the statute if it can be attributed to a debt that is not barred. *Prima facie*, it is to be taken as payment on account of the sum that is not barred. (c) Payment of a dividend by the inspectors under a deed of inspectorship, executed for the purpose of administering the estate of a debtor, is not a sufficient part payment to take the debt out of the operation of the statute of limitations so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy. (d)

Part Payment by Bill or Note. — If a bill of exchange is delivered as a part payment under circumstances which show that more was admitted to be due, the statute of limitations as to the

(y) *Cleave v. Jones*, 6 Exch. 578; 20 L. J. Ex. 238. 118; 16 L. J. Ex. 232; *Baildon v. Walton*, 1 Exch. 617.

(z) *Foster v. Dawber*, 6 Exch. 853; 20 L. J. Ex. 385; *Tippets v. Heane*, 1 C. M. & R. 252. (c) *Nash v. Hodgson*, 25 L. J. Ch. 188; *Walker v. Butler*, 6 Ell. & Bl. 506; *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fowkes*, 7 Sc. 444.

(a) *Waugh v. Cope*, 6 M. & W. 829; *Burkitt v. Blanshard*, 3 Exch. 89. (d) *Topping, Ex parte, in re Levey*, 34 L. J. Bk. 44.

(b) *Wainman v. Kynman*, 1 Exch. 34 L. J. Bk. 44.

residue of the debt will run from the time of the delivery of the bill. (e) If a debtor draws a bill of exchange and delivers it to the creditor to be applied in part payment of the debt, and the bill is paid when due by the drawee, the part payment operates from the time of the drawing and delivery of the bill, and not from the time of its payment. (f)

Part Payment by Performance of Service or by Delivery of Goods. — The performance of any duty or service which the parties may agree to receive and treat as a part payment will operate as such. (g) Where goods and chattels were delivered and received by agreement of the parties in reduction of a debt, it was deemed to be a part payment within the proviso of the statute. (h) But if the delivery and acceptance are nothing more than the common case of two tradesmen, each selling goods to the other, without any agreement that the goods delivered on one side should be * considered as payment for [* 1264] those delivered on the other, the transaction will not amount to a payment within the proviso. (i)

Part Payment by Adjustment and Settlement of Accounts. — Where there are mutual accounts between parties, with items on both sides, and the parties go through such accounts, setting off one item due to one against another item due to another, and striking a balance, the party entitled to the balance will have six years from the period of the stating of the account for the recovery of such balance, the transaction amounting, as we have already seen, to a new contract between the parties, giving rise to a new cause of action, and not being a mere acknowledgment or admission of an existing debt. The plaintiff in such a case does not go upon the original debt at all. (k) Entries made in a book by direction of a deceased party of payment of interest, are admissible in evidence for the purpose of repelling the operation

(e) *Turney v. Dodwell*, 3 Ell. & Bl. 136; 23 L. J. Q. B. 137.

(f) *Irving v. Veitch*, 3 M. & W. 90; *Gowan v. Forster*, 3 B. & Ad. 507.

(g) *Bodger v. Arch*, 10 Exch. 341; 24 L. J. Ex. 22.

(h) *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens*, 4 Ad. & E. 71.

(i) *Cottam v. Partridge*, 4 Sc. N. R. 834.

(k) *Ashby v. James*, 11 M. & W. 542; *Smith v. Forty*, 4 C. & P. 126; *Holmes v. Mackrell*, 3 C. B. n. s. 789; *Amos v. Smith*, 1 H. & C. 238; 31 L. J. Ex. 423.

of the statute of limitations, whenever the entries are against the interest of the party directing them to be made. (*l*) A statement of account by a client to his attorney in his professional character, to enable the latter to lay a case before counsel, is a privileged communication, and cannot be used in evidence against the client. (*m*)

Payment of Interest on a debt operates as an admission of the debt and an extension of the period of limitation; and oral evidence is admissible to show on what account the money was paid. (*n*) But the payment of interest, like part payment, must be such that a promise to pay the principal may be inferred in fact. Thus where the maker of a note was sued for the interest then due upon it, and judgment having been recovered against him, he paid the amount sued for, it was held that this payment of interest did not take the principal debt out of the operation of the statute. (*o*) If, however, the defendant admits the debt and pays interest thereon, and at the same time declares that he will pay nothing further, the jury may give effect to the admission and payment, and disregard the declaration. It is for a jury to say, from what was said and done in connection with the payment, whether it was a payment of interest on an admitted debt, or whether the debt was repudiated, and had no existence at the time of payment. (*p*) If the debt is secured [* 1265] partly by bills and * notes and simple contracts, and partly by bonds or mortgage deeds and specialty securities, and interest is paid on the whole debt generally, the time of limitation will be extended as to all the securities. (*q*) If a debtor pays a principal debt barred by the statute, and expressly refuses to pay interest, the payment of the principal will not revive the claim to the interest. (*r*) Payment of interest on bills or notes is an admission of continued liability down to the

(*l*) *Bradley v. James*, 13 C. B. 822; 22 L. J. C. P. 193.

(*m*) *Cleave v. Jones*, 7 Ex. 421.

(*n*) *Waters v. Tomkins*, 2 C. M. & R. 727; *Bevan v. Gething*, 3 Q. B. 740; *Burn v. Boulton*, 2 C. B. 484; *Evans v. Davies*, 4 Ad. & E. 841.

(*o*) *Morgan v. Rowlands*, L. R. 7 Q. B. 493; 41 L. J. Q. B. 187.

(*p*) *Wainman v. Kynman*, 1 Exch. 118; 26 L. J. Ex. 232; *Baldon v. Walton*, 1 Exch. 617.

(*q*) *Dowling v. Ford*, 11 M. & W. 329.

(*r*) *Collyer v. Willock*, 4 Bing. 313.

period of such payment of interest, and causes the time of limitation to run therefrom. (s) It is also evidence of a demand of payment of the note having been made, — *i.e.*, of the debt being due; for interest is paid for forbearance of a debt. (t) If indorsements on a bill or note of payment of interest or principal are put in evidence as an admission of the debt, they must be signed by the debtor, or have been made in his presence, or by his direction, or by some party who was acting as his agent in the matter. (u) It is not essential that money should actually pass between the debtor and creditor to constitute a payment of interest. Where the debtor was about to pay the creditor, his father, the interest due, but the father stopped him, and writing a receipt for the money, gave it to the son's wife, saying that he would make her a present of the money, it was held that there was a sufficient payment. (x)

Part Payment by One of Several Joint and Several Debtors or Co-Contractors. — Formerly, if one of several joint-debtors, or one of several joint and several debtors or co-contractors, paid part of the debt due, or paid interest thereon, the payment was a payment by all, and extended the period of limitation as to all, although the payment was made by the one without the concurrence, or in fraud, of the others. But now, by the 19 & 20 Vict. c. 97, sect. 14, it is enacted that two or more co-contractors or co-debtors, whether jointly or severally liable, or the executors or administrators of any contractor, shall not lose the benefit of the statute of limitations, and be rendered chargeable, by reason of payment of principal or interest, or other money, by another co-contractor or co-debtor, executor or administrator. A payment made before the passing of this statute is not operated upon by this section, which has no retrospective effect. (y) Part payment by a partner will extend the period of limitation as to the whole of the firm, as each partner is the agent to the other * to pay the debt; but part payment by a [* 1266]

(s) *Bamfield v. Tupper*, 7 Exch. 27; *Bealy v. Greenslade*, 2 Cr. & J. 61.

(t) *In re Rutherford*, 14 Ch. D. 687.

(u) 9 Geo. IV. c. 14, sect. 3; *Briggs v. Wilson*, 17 Beav. 330; *Bradley v. James*, *ante*, p. *1264.

(x) *Maber v. Maber*, L. R. 2 Ex. 153; 36 L. J. Ex. 70; *Amos v. Smith*, 1 H. & C. 238; 31 L. J. Ex. 423.

(y) *Jackson v. Woolley*, 8 Ell. & Bl. 784; 27 L. J. Q. B. 448.

continuing partner after a dissolution of partnership will not affect a retiring partner. (z)

Payment by Strangers and Agents.— Where a married woman, after her marriage, paid interest without the knowledge of her husband on a promissory note given by her whilst she was a *feme sole*, it was held that the cause of action upon the note could not be kept alive by any act of the wife during coverture done without the knowledge and sanction of the husband. (a) Where a promissory note had been signed by the defendants as churchwardens or overseers of a parish, and interest had been regularly paid upon the note by the overseers of the parish for the time being, it was held that it was for a jury to say whether the defendants had not constituted the churchwardens and overseers for the time being their agents for the payment of the interest. (b) If payment is made by one of several executors, it must be made under circumstances from which the concurrence of the other executors would be implied, in order to keep alive the remedy against the assets in their hands. (c) Payment of interest on an Irish mortgage made by a receiver appointed over the estates mortgaged, is payment by an agent of the party liable within the meaning of the 3 & 4 Wm. IV. c. 27, sect. 40 (repealed, see 37 & 38 Vict. c. 57, sect. 9; *ante*, p. * 1248), and bars the statute. (d) Payment of interest by the devisees in trust of the real estate of a deceased covenantor does not bind the equitable tenant for life. (e)

Payment to Strangers and Agents.— A payment to a third person by direction of the creditor is a payment to the creditor himself; (f) and if money is lent by a trustee acting on behalf of the *cestui que trust*, a payment to the latter is equivalent to a

(z) *Watson v. Woodman*, L. R. 20 Eq. 721. *v. Lowe*, 25 Beav. 421; 2 De G. & J. 704.

(a) *Neve v. Hollands*, 21 L. J. Q. B. 289; *Pittman v. Foster*, 1 B. & C. 250. (d) *Chinnery v. Evans*, 11 H. L. Cas. 115.

(b) *Jones v. Hughes*, 5 Exch. 104; 19 L. J. Ex. 200; *Rew v. Pettet*, 1 Ad. & E. 200. (e) *Coope v. Creswell*, L. R. 2 Ch. 112; 36 L. J. Ch. 114; and see *Pears v. Laing*, L. R. 12 Eq. 41; 40 L. J. Ch. 225.

(c) *Scholey v. Walton*, 12 M. & W. 513; *Tullock v. Dunn*, R. & M. 416. (f) *Worthington v. Grimsditch*, 7 Q. B. 484. As to proof of agency, see *Harding v. Edgecombe*, 28 L. J. Ex. 313; *Whitley*

payment to the trustee. (g) Payment to a husband of interest which has accrued due upon the wife's chose in action is equivalent to payment to the wife; (h) and a payment to a person supposed by the debtor to be duly authorized to receive the money, but who had no authority to receive it, may be made as good a payment and acknowledgment under the statute as if the money had been paid to the party rightfully entitled. (i)

*** Limitation of Actions in respect of Contracts made** [* 1267]
Abroad. — Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title or cause of action itself, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy. By the French law, all rights of action relative to letters of exchange and bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, expire in five years, reckoning from the day of protest, or from the last suing out of any judicial process, if there has been no judgment, or if the debt has not been acknowledged by any separate act. But the alleged debtors are held, if required, to affirm on oath that they are no longer indebted, and their widows, heirs, &c., that they *bona fide* believe there is no longer anything due. The French law of limitation, therefore, does not extinguish or annul the contract, but operates upon the remedy only. If, therefore, a party who has contracted in France removes to this country, and is sued here upon the contract, the action will be governed by the English, and not by the French, law of limitation of actions; for all that relates *ad litem ordinationem* is regulated by the law of the country where the action is brought. (k)

(g) *Meggison v. Harper*, 2 C. & M. 322.

(h) *Hart v. Stephens*, 6 Q. B. 937.

(i) *Clark v. Hooer*, 10 Bing. 480.

(k) *Huber v. Steiner*, 2 Sc. 326; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1; *Ruckmaboye v. Motti-*

A judgment of a foreign court in favor of the defendant upon a plea setting up a law of limitation, which bars the remedy, but not the debt, is no bar to an action for the debt in the courts of this country. (*l*)

Suspension of the Statute. — When a debtor takes out administration to his creditor, the running of the statute is suspended during the administration. (*m*)

No Limitation in Cases of Express Trust. — By the 36 & 37 Vict. c. 66, sect. 25, (2) no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any statute of limitations. (*mm*)

chund, 8 Moo. P. C. 4; Gibson v. Holland, L. R. 1 C. P. 1; 35 L. J. C. P. 5; Harris v. Quine, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331.

(*l*) Harris v. Quine, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331.

(*m*) Seagram v. Knight, L. R. 2 Ch. 628; 36 L. J. Ch. 918.

(*mm*) See Burdick v. Garrick, L. R. 5 Ch. 233; Knox v. Gye, 5 H. L. 656; Stone v. Stone, L. R. 5 Ch. 74. But the statute will run, where the trustee gets money not belonging to the *cestui que trust*, but which he can claim on the ground of fraud. Metropolitan Bank v. Heiron, 5 Ex. D. 319, C. A.

• CHAPTER IV.

[* 1268]

THE TRANSFER OF CONTRACTS.

SECTION I.

TRANSFER BY ASSIGNMENT.¹¹²

Of the Assignment of Personal Contracts.¹ — The common law in times past discountenanced the assignment of all rights and causes of action, as tending to increase maintenance and litigation, and would not, consequently, suffer the right to the fulfilment of a contract of a personal nature to be transferred from hand to hand. The performance of a contract for work might be delegated to a subordinate agent or servant, but not the right to sue upon the contract. Thus where A, being employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, and the plaintiff, having performed all that A had undertaken to perform, brought his action

¹ Consult 1 Pars. Contr. c. 14, p. 223; 1 Story, Contr. (5th ed.) sects. 464–478, 563–567; 2 Story, Contr. c. 57; U. S. Dig. tit. *Assignment*.

Recent decisions are, — *Cowdrey v. Vandenburg*, 101 U. S. 575; *Pond v. Cooke*, 45 Conn. 126; *Paine v. Lester*, 44 Conn. 196; *Clarke v. Hawkins*, 5 R. I. 219; *Shorts v. Awalt*, 73 Ind. 304; *Ellis v. Sisson*, 96 Ill. 105; *Leach v. Greene*, 116 Mass. 534; *Aldrich v. Campbell*, 4 Gray, 284; *Levy v. Levy*, 78 Pa. St. 507; *Murrell v. Jones*, 40 Miss. 565; *Tully v. Herrin*, 44 Miss. 626; *Bunting v. Camden, &c. R. R. Co.*, 81 Pa. St. 254; *Coffin v. Adams*, 131 Mass. 133; *Foss v. Nutting*, 14 Gray, 484; *Fisk v. Brackett*, 32 Vt. 798; *Beardslee v. Morgnor*, 73 Mo. 22; *Ætna Bank v. Fourth National Bank*, 46 N. Y. 82; *Mills v. Murry*, 1 Neb. 327; *Worthington v. Curd*, 15 Ark. 491; *Andrews v. Rue*, 34 N. J. L. 402; *Halloran v. Whitcomb*, 43 Vt. 306; *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439; *Pickens v. Hathaway*, 100 Mass. 247; *Trimble v. Strother*, 25 Ohio St. 378; *Durham v. Bischof*, 47 Ind. 211; *Davis v. Bechstein*, 69 N. Y. 440; *Devlin v. New York*, 63 N. Y. 8; *Union College v. Wheeler*, 61 N. Y. 88; *Wood v. New York*, 73 N. Y. 556; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Klein v. French*, 57 Miss. 662; *Roberts v. Carter*, 38 N. Y. 107; *Parsons v. Woodward*, 22 N. J. L. 196.

¹¹² See Appendix, Vol. III.

against the defendant for the stipulated remuneration, it was held that there was no privity between the plaintiff and the defendant, that he was not a party to the contract, and could not sue upon it. (a) If an order was given to A for the supply of goods, and B stepped in and executed it by the authority of A, he was taken to execute as the agent of A, and could not himself sue for the price of the goods, unless, before the goods had been received and consumed by the intended purchaser, he had given notice to the latter that he had himself supplied them, and looked to him for payment. (b) If after the receipt of such a notice the party giving the order accepted the goods, he was then taken to have entered into a new contract for the purchase of them from the party to whom the execution of the original order had been delegated. But in equity, an assignment of a chose in action after notice to the debtor had always [* 1269] been held to be perfectly * valid, so as to pass the beneficial interest; (c) and latterly, the ancient rule of the common law had evaporated to a mere shadow. It no longer prevented the assignee from suing, but regulated merely the form of his action. He could not sue in his own name; but he was in general permitted to bring his action, and to recover in the name of the original assignor, the party with whom the contract was entered into. (d)

In modern times, too, the legislature, yielding to the wants and necessities of mankind, had sanctioned the assignment of certain bonds and contracts, and authorized the assignees to sue upon them in their own names, such as bail bonds, (e) replevin bonds, (f) India bonds, (g) railway bonds, (h) Exchequer bonds, (h) administration bonds, (i) bills of lading, (k) and policies

(a) *Schmaling v. Thomlinson*, 6 Taunt. 147.

(b) *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; *Hardman v. Booth*, H. & C. 803; 32 L. J. Ex. 105.

(c) *Winch v. Keeley*, 1 T. R. 619.

(d) *Master v. Miller*, 4 T. R. 340; *Lagh v. Legh*, 1 B. & P. 447; *Alner v. George*, 1 Campb. 392; *Brandt v. Heatig*, 2 Moore, 184; *Pickford v. Ewington*, 4 Dowl. P. C. 453; *Morrison v. Parsons*, 2 Taunt. 407.

(e) 4 Anne, c. 16, sect. 20.

(f) *Thompson v. Farden*, 1 M. & Gr. 535; *Dias v. Freeman*, 5 T. R. 195.

(g) 51 Geo. III. c. 64, sect. 4; *Glynn v. Baker*, 13 East, 509.

(h) *Glynn v. Baker*, 13 East, 509; *Vertue v. East Angl. &c.*, 5 Exch. 280; 19 L. J. Ex. 235.

(i) 20 & 21 Vict. c. 77, sects. 81, 83.

(k) 18 & 19 Vict. c. 111.

of marine, (*l*) and life (*m*) assurance. The assignee of a Scotch bond, which is a negotiable instrument in Scotland, might maintain an action of *assumpsit* in this country against the obligor upon the implied promise raised by the indorsement and assignment to him of the bond; (*n*) and as the assignment of judgments by confession is authorized by act of parliament in Ireland, the assignee of such a judgment might maintain an action in this country upon it in his own name. (*o*) A corporate body having issued assignable debentures purporting to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value, that the debentures have been issued illegally, and in contravention of the statutory powers. (*p*)

The legislature had also authorized the assignee of the choses in action of a joint-stock company in liquidation (*q*) and the assignee of the book-debts of a bankrupt (*r*) to bring actions for such choses in action or book-debts in his own name. And now, by the Supreme Court of Judicature Act, (*s*) any debt or other chose in action may be assigned absolutely by writing under the hand of the assignor; and such assignment, after express notice in writing has been given to the debtor, will be effectual in law * (subject to all equities which [* 1270] would have been entitled to priority over the assignee if that act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. Previously to the passing of this act, the general rule of the Court of Equity was that the assignee of a chose in action took it subject to all the equities between the original

(*l*) 31 & 32 Vict. c. 86. A policy may be assigned under this act after a loss has occurred. *Lloyd v. Fleming*, L. R. 7 Q. B. 299; 41 L. J. Q. B. 93. As to set-off of premiums, see *Pellas v. The Neptune Co.*, 5 C. P. D. 34, C. A.

(*m*) 30 & 31 Vict. c. 144; *In re Haycock's Policy*, 1 Ch. D. 611.

(*n*) *Innes v. Dunlop*, 8 T. R. 595.

(*o*) *O'Callaghan v. Thomand*, 3 Taunt. 82.

(*p*) *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*q*) 25 & 26 Vict. c. 89, sects. 95, 157.

(*r*) Bankruptcy Act of 1869, sect. 111.

(*s*) 36 & 37 Vict. c. 66, sect. 25 (6).

parties to the contract, (*t*) that is, to all the equities subsisting at the date of the assignment, (*u*) and this will still prevail as the general rule; but the parties to the original contract may, by express stipulation or by implication arising from their conduct, agree that the chose in action may be assigned free from such equities; and in that case an assignee will take the chose in action discharged from such equities accordingly, (*v*) or he may be released therefrom by the conduct of the debtor after the assignment. (*x*) Where there is a distinct promise held out by a company informing all the world that they will pay to the order of a person named, it is not competent for that company afterward to set up equities of their own, and say that, because the person who makes the order is indebted to them, they will not pay. (*y*) And a debenture, which merely means an instrument showing that the maker owes and is bound to pay, if made payable to order or bearer, is such a promise. (*z*) When the assignor of a debt has collateral securities for the debt, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. (*a*)

Moneys due and to become due under a contract may be assigned, and if paid over *bona fide* to the original debtor, may be recovered back by the assignee. So where G, who was building a vessel for the defendant, directed the defendant to pay to the plaintiff, to whom he owed money, all money due or to be due from the defendant to G, and all money due had been paid, and the defendant, notwithstanding, paid the money becoming

(*t*) *In re Natal Investment Co.*, L. R. 3 Ch. 355; 37 L. J. Ch. 362; *Rodger v. The Comptoir d'Escompt de Paris*, L. R. 2 P. C. 393; 38 L. J. P. C. 30. This case has been dissented from on the ground that the title was not to a chose in action in that case, but to a legal right of ownership. See *Leask v. Scott*, 2 Q. B. D. 376, C. A.

(*u*) *Re China Steamship Co.*, L. R. 7 Eq. 240.

(*v*) *Ex parte Asiatic Banking Corp., in re Agra & Masterman's Bank*, L. R. 2 Ch. 391; 36 L. J. Ch. 222; *In re Blakely Ordnance Co.*, L. R. 3 Ch. 154;

37 L. J. Ch. 418; *Ex parte City Bank*, L. R. 3 Ch. 758; *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458; 39 L. J. Ch. 829; *Dickson v. Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44; 38 L. J. Q. B. 17.

(*x*) *Higgs v. The Northern Assam Tea Co.*, L. R. 4 Ex. 387; 38 L. J. Ex. 233; *Ex parte Brunton*, L. R. 19 Eq. 302.

(*y*) *Wood, L. J., Ex parte City Bk.*, L. R. 3 Ch. 758, 762.

(*z*) *Re Imperial Land Co. of Marseilles, ex parte Colborne & Strawbridge*, L. R. 11 Eq. 478.

(*a*) *Story's Eq. Jur.* sect. 1047 a.

* due to G, it was held that he must pay it over again [* 1271] to the plaintiff. (b)

What is an Assignment.¹ — The 25th section of the Judicature Act, 1873 (*ante*, p. * 1269), does not make anything an assignment which was not an assignment before. (bb) As a general rule, anything written, said, or done, in pursuance of an agreement, and for valuable consideration, or in consideration of an antecedent debt, to place a chose in action out of the control of the creditor, and appropriate it in favor of another person, amounts to an equitable assignment. (c) So that an order given by a debtor to his creditor upon a person owing money to such debtor, directing such person to pay the creditor out of such money, will amount to an irrevocable equitable assignment of such money, or a sufficient part thereof, if made in consequence of a direct agreement; and if such money is handed over to the assignor by the person so ordered to pay, he will be made to pay it over again to the assignee. (d) But a promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person. (e) And a cheque is not an equitable assignment of the drawer's balance at his banker's. (f) Where S insured his life for the purpose, as he told the company, of giving C a security for his debt, and sent the policies to C with a letter, asking C to get his solicitor to prepare an assignment, but none was ever made, and C on S's death, gave notice to the company, which the company acknowledged, it was held that there was no equitable assignment. (g) And an agreement in writing to execute, on request, an effectual

¹ When an assignment of corporate shares carries dividends, see *Boardman v. Lake Shore, &c. Ry. Co.*, 84 N. Y. 157.

(b) *Brice v. Bannister*, 3 Q. B. D. 569; *Ex parte Hall*, 10 Ch. D. 615. 860, 861, 907; *Chowne v. Baylis*, 31 Beav. 351; *Smith's Man. of Eq.* p. 246.

(bb) *Schroeder v. Central Bank*, 24 W. R. 710; *Re Haycock's Policy*, 1 Ch. D. 611; *Ex parte Culling*, 9 Ch. D. 307, C. A. An assignment of moneys not yet due may be an "absolute assignment." *Brice v. Bannister*, 3 Q. B. D. 569.

(c) *Spence's Eq. Jur.* vol. 2, pp. 885,

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(d) *Jones v. Farrell*, 1 D. & J. 208.

(e) *Field v. Megaw*, L. R. 4 C. P. 660.

(f) *Hopkinson v. Forster*, L. R. 19 Eq. 74.

(g) *Crossley v. City of Glasgow Ina. Soc.*, 4 Ch. D. 421.

mortgage of a policy deposited as security for a loan, is not an assignment. (*h*)

Notice of Assignment.² — When a chose in action has been assigned, notice must be given to the debtor, in order to perfect the interest of the assignee, and secure him against any claims by subsequent assignees. But an assignment without notice is good as against a subsequent judgment creditor of the [* 1272] assignor. (*i*) * If no notice has been given to the debtor, payment by him to the assignor is a good discharge; and a subsequent assignee, who first gives notice to the debtor, will be preferred to a prior assignee who has not given notice. (*k*) The principle applies where the second assignee has taken his assignment from the legal personal representative of the *cestui que trust*, and not from the *cestui que trust* himself. (*l*) Notice of the assignment of a trade-debt not given to the debtor until after the bankruptcy of the assignor, is insufficient to take it out of the order and disposition of the bankrupt; and the title of the trustee will prevail over that of the assignee. (*m*) And it is immaterial that the notice was given by the assignee to the debtor before the latter had notice of the bankruptcy. (*n*) It is sufficient if the notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable, or is merely charged with the duty of making the pay-

² Necessity and effect of notice to the debtor of assignment of the demand against him, see *Vanbuskirk v. Hartford Fire Ins. Co.*, 36 Am. Dec. 473, and note on Necessity of notice to debtor of the assignment, *ib.* 475.

Late cases as to notice of assignment are, — *Heermans v. Ellsworth*, 64 N. Y. 159; *Guillauder v. Howell*, 35 N. Y. 657; *Thayer v. Daniels*, 113 Mass. 129; *Felch v. Bugbee*, 48 Me. 9; *Miller v. Kreiter*, 76 Pa. St. 78; *Pass v. McRea*, 36 Miss. 143; *Ward v. Morrison*, 25 Vt. 593; *Upton v. Hubbard*, 28 Conn. 274; *South Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 585.

(*h*) *Spencer v. Clarke*, 9 Ch. D. 137. As to what is not an "absolute assignment," but is "by way of charge only," see *National Prov. Bank v. Harle*, 6 Q. B. D. 626.

(*i*) *Bevan v. Lord Oxford*, 6 D. M. & G. 492; 25 L. J. Ch. 299, which is to be preferred to *Watts v. Porter*, 3 E. & B. 743; 23 L. J. Q. B. 345, where the contrary was held by the majority of the Court; see *Pickering v. Ilfracombe Ry.*

Co., L. R. 3 C. P. 235, and *Crow v. Robinson*, L. R. 3 C. P. 264.

(*k*) *Dearle v. Hale*, 3 Russ. 1; *Lovridge v. Cooper*, 3 Russ. 1, 30; *Foster v. Cockerell*, 3 Cl. & F. 456.

(*l*) *In re Freshfield's Trust*, 11 Ch. D. 198.

(*m*) *In re Webb*, 36 L. J. Ch. 341; *Barnes v. Pinkney*, 36 L. J. Ch. 815.

(*n*) *In re Tichener*, 35 Beav. 317.

ment. (o) The Supreme Court of Judicature Act (p) requires, in order that the legal estate may pass, that the notice should be in writing; but a notice by word of mouth is sufficient to effect an equitable assignment. (pp) Where the debt is due from a company in course of winding up, notice to the official liquidator is sufficient. (q) By an assignment of a bond, policy of insurance, or other instrument of contract, the right of property in the instrument itself passes to the assignee, so that an action is maintainable for the recovery of possession of the document. (r)

When an Assignment of a Chose in Action may be made the Foundation of a New Contract. — When the assignment of a personal contract is defective in form merely, any promise by the person liable upon the contract to pay the demand or satisfy the claim, in consideration that the assignee will give him time for payment, or forbear for a particular period to sue him, will enable the assignee to maintain an action in his own name upon such new contract or promise. (rr)

* SUB-SECTION I.

[* 1273]

OF COVENANTS RUNNING WITH THE LAND.¹¹³

Covenants running with Land¹ are transferable; they pass from hand to hand with the interest in the realty to which they are annexed, and are called "real contracts." To enable a covenant to run with the land, it is not necessary that the covenantor

¹ Rawle, *Covenants for Title*, c. 10; U. S. Dig. tit. *Covenants*, sect. 144; Ann. Dig. 1870-1878, tit. *Covenants*; ib. 1879, &c., tit. *Covenant*, II. f.; U. S. Dig. tit. *Deeds*, V. sect. 2175.

(o) *Addison v. Cox*, L. R. 8 Ch. 76. (rr) *Morton v. Burn*, 7 Ad. & E. 19;
 (p) 36 & 37 Vict. c. 66, sect. 24 (6). *Reynolds v. Prosser*, Hardr. 71; *Forth*
 (pp) *In re Tichener*, 35 Beav. 317. *v. Stanton*, 1 Saund. 210, n. 1, n. a;
 (q) *Wragge's case*, L. R. 5 Eq. 284. *Jeffs v. Day*, L. R. 1 Q. B. 372.
 (r) *Watson v. McLean*, 1 Ell. Bl. &
 Ell. 77.

¹¹³ See Appendix, Vol. III.

should be possessed of any estate in the land; but the covenantee must be clothed with some transferable interest therein, to which the covenant can be attached; for otherwise the covenant is a mere personal covenant. (s) If, therefore, the covenantee is a mortgagor in fee, or a *cestui que trust*, the covenants are personal covenants, and do not run with the land, as the covenantee has no estate recognized by law in the land to which the covenants can be annexed. (t) A covenant cannot run with a ship or any personal perishable chattel. (u)

Privity of Estate and Privity of Contract.—Covenants entered into by owners of real property who convey away their entire interest in the land to the covenantee, are annexed to the estate so transferred, and pass to the assignee of that estate, so as to give him an action upon them against the covenantor, his real and personal representatives. Thus if A, seised of lands in fee, conveys his estate and interest by deed to B, and covenants with B to make further assurance, and B then conveys to C, who conveys to D, D may require A to make further assurance to him of the lands according to the covenant, and on his refusal may maintain an action against him. (x) So if two co-parceners make partition of lands, and the one covenants with the other and her heirs to acquit her and her heirs of a certain suit issuing out of the lands, the assignee of the estate of the covenantee shall have an action upon the covenant; (y) and the same transfer of the right of action upon the covenant prevails, whether the interest conveyed by the covenantor be an estate of inheritance in the land, or a chattel real only. (z) If a man, too, purports to grant lands to another in fee, by such conveyance as will pass a fee, and covenants that he is seised in fee, and [* 1274] hath good right to convey, and it subsequently *appears that at the time of the conveyance he was not seised in fee, and had not a right to convey, and no fee in the lands

(s) Co. Litt. 385 a.

(x) *Middlemore v. Goodale*, Cro. Car.(t) *Webb v. Russell*, 3 T. R. 393;

503, 505.

Whitton v. Peacock, 2 Sc. 630; 2 Bing.

(y) Co. Litt. 385 a.

N. C. 411.

(z) *Lewis v. Campbell*, 3 Moore, 35;(u) *Splidt v. Bowles*, 10 East, 279;*Campbell v. Lewis*, 3 B. & Ald. 392;*De Mattos v. Gibson*, 4 De G. & J. 276;*Simpson v. Clayton*, 4 Bing. N. C. 758.

28 L. J. Ch. 502.

passed to the covenantee, yet the assignee of the covenantee who takes such estate and interest in the land as did pass to the covenantee, and who would have had the benefit of the covenant if it had been fulfilled, shall have an action upon it against the covenantor, to recover damages for the breach, the intent of the law in all these cases being "to give the damages to the party grieved." (a)

But covenants entered into by the owners of land with persons who have no estate or interest at all in the land are not, it seems, annexed to the estate of the covenantor, and do not run with the land, so as to charge the assignees of the covenantor with the burthen of the performance of them. If the owner of an estate of inheritance in land, for example, covenants with a stranger who has no interest at all in the soil, that the land holden by the covenantor shall never be built upon, or never planted or enclosed, or that it shall only be used or enjoyed by the covenantor in some particular manner, the covenant is a mere personal covenant. (b) Reason and justice, however, seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. (c) If, therefore, a party buys an estate, and accepts a conveyance with full knowledge of the existence of a covenant or agreement of this description, he may be compelled to fulfil it. (d) And as a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, he may in some cases

(a) *Jones v. King*, 4 M. & S. 188.

(b) *Keppell v. Bailey*, 2 Myl. & K. 538; 1 Smith's L. C. 70; 71, 5th ed.; *Ackroyd v. Smith*, 10 C. B. 164; 19 L. J. C. P. 315.

(c) *De Mattos v. Gibson*, 4 De G. & J. 276, 282; 28 L. J. Ch. 502.

(d) *Western v. M'Dermott*, L. R. 2

Ch. 72; 36 L. J. Ch. 76; *Jay v. Richardson*, 30 Beav. 563; 31 L. J. Ch. 398; *Catt v. Tourle*, L. R. 4 Ch. 656; 38 L. J. Ch. 665; *Cooke v. Chilcott*, 3 Ch. D. 694; *Luker v. Dennis*, 7 Ch. D. 227; *Haywood v. Brunswick Building Soc.*, 8 Q. B. D. 403.

be bound by a covenant of this description, even without knowledge of its existence. Thus where the owner of a freehold house, in the conveyance to himself, had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop, and the house was afterward let to the defendant as tenant from year to year,

[* 1275] without express notice of * the covenant, it was held

that the defendant was bound by it. (*e*) Where a purchaser or lessee has notice of a deed, he has constructive notice of its contents, and is not protected by an express representation that such deed contains no restrictive covenants, nor anything affecting the title. (*f*) But where neither the original conveyance nor a subsequent assignment to the landlord of the defendant contained any reference to a separate covenant entered into between the original grantor and grantee, and the landlord falsely stated that he was not aware of the existence of the covenant, it was held that no relief could be had against the tenant, who had opened a public-house, because if he had asked his landlord, he would have been told there was no restriction, and if he had seen the conveyance, he would have found none; and it was remarked that the doctrine of constructive notice had already been carried far enough. (*g*)

A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion. (*h*)

Covenants between Landlord and Tenant, or Reversioner and Lessee,¹ affecting the value or enjoyment of the property by the lessee during the term, are annexed to the estate granted, and run with the land as long as that estate continues; and the right

¹ See 2 Story, Contr. c. 54, 55; 1 Para. Contr. 499-518; U. S. Dig. tit. *Landlord and Tenant*, II. 2; also authorities cited in notes upon Landlord and tenant, *ante*, Vol. I. pp. * 222, * 223, * 231, * 237.

(*e*) *Wilson v. Hart*, L. R. 1 Ch. 463; 353; and this is so notwithstanding 37 35 L. J. Ch. 569; *Fielden v. Slater*, L. R. & 38 Vict. c. 78, sect. 2.

7 Eq. 523; 38 L. J. Ch. 379; *Jones v. Bone*, L. R. 9 Eq. 674; 39 L. J. Ch. 405; *Keates v. Lyon*, L. R. 4 Ch. 222; 38 L. J. Ch. 357. (*g*) *Carter v. Williams*, L. R. 9 Eq. 678; 39 L. J. Ch. 560.

(*h*) *Clements v. Welles*, L. R. 1 Eq. 200; 35 L. J. Ch. 265.

(*f*) *Patman v. Harland*, 17 Ch. D.

of action upon them in case of breach vests in the assignee of the term. Such are covenants by the lessor to repair, or to grant estovers for the repair and maintenance of the demised tenements, or for burning within the house during the term; (*i*) to cleanse and repair watercourses; (*k*) to supply the demised premises with water; (*l*) to acquit the land of certain suits and charges; (*m*) also covenants for renewal, and provisos for re-entry or defeasance of the estate granted; (*n*) covenants for quiet enjoyment; (*o*) and all the usual covenants for title. "And of these covenants, assignees in deed or in law, and assignees of assignees *in infinitum*, shall take advantage; also assignees of executors or administrators, tenants by statute or *elegit*, or after a sale upon a *feri facias*, or a husband in right of his wife, — any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named * therein, yet may he take advantage there- [* 1276] of." (*p*) By the Conveyancing and Law of Property Act, 1881, the obligations of a lessor's covenants are to run with the reversion, notwithstanding severance, as to leases made after 31st December, 1881. (*q*)

"If, on the other hand, the lessee enters into similar covenants with the lessor, and afterward assigns over his estate, the assignee will be responsible for all breaches of covenant that accrued during the time the term or estate continued vested in him, (*r*) although the covenant wants the word assigns, and although he has never entered and taken possession of the land; (*s*) for by taking the estate, he makes himself subject to the covenants, *quia transit terra cum onere*." (*t*) But this liability is extinguished as soon as the privity of estate is destroyed; and the assignee, consequently, may get rid of the burthen of the performance of the covenant at any time by simply assign-

(*i*) *Spencer's case*, 5 Co. 17 b; Bac. Abr. *Covt.* (E) 5.

(*k*) *Holmes v. Buckley*, Prec. Ch. 39.

(*l*) *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*m*) 5 Rep. 18 a.

(*n*) *Roe v. Hayley*, 12 East, 468.

(*o*) *Williams v. Burrell*, 1 C. B. 429.

(*p*) *Shep. Touch.* c. 7.

(*q*) 44 & 45 Vict. c. 41, sect. 11.

(*r*) *Harley v. King*, 2 C. M. & R. 18.

(*s*) *Williams v. Bosanquet*, 3 Moore, 500.

(*t*) *Bally v. Wells*, 3 Wils. 29; *Tatem v. Chaplin*, 2 H. Bl. 133.

ing over his estate. (*u*) He cannot, by the assignment, release himself from liability in respect of actually existing breaches; (*x*) but he escapes from all responsibility in respect of breaches afterward accruing, though his assignee be a mere pauper or an insolvent. (*y*) This, however, is not the case with the original lessee; the latter remains liable upon the covenants he himself has expressly entered into with the lessor. For the privity of contract, as between him and the lessor, is held to remain, although the privity of estate has been destroyed by the assignment of the estate; (*z*) and he and his personal representatives (*post*, Sect. III.) may consequently be sued upon the covenants by the lessor; for "though the assignee becomes liable to the lessor for the performance of all the covenants which run with the land, yet the lessee is also liable, in the nature of a surety, for the performance of the same covenants." (*a*) And if by reason of the non-performance of the covenants by the assignee for the time being during the continuance of his interest in the premises, the burthen of the fulfilment of them is thrown upon the lessee, and the latter is compelled by the lessor to do that which the assignee, by taking the assignment, has impliedly undertaken to do as between himself and the lessee, the latter may maintain an action against him to recover the amount paid to the lessor, and all the costs and damages he has been [* 1277] put * to by reason of the non-fulfilment of the covenant on the part of the assignee. (*b*) But in order to render the assignee liable upon the covenants, he must be clothed with the same estate as that which the lessee had in the land at the time the covenants were entered into. An under-lessee, therefore, is not responsible upon the covenants, inasmuch as he is not possessed of the estate to which they are annexed. (*c*) By the Conveyancing and Law of Property Act, 1881, the rent

(*u*) *Paul v. Nurse*, 8 B. & C. 486.

(*x*) *Harley v. King*, 5 Tyr. 692.

(*y*) *Lekeux v. Nash*, Str. 1221; *Taylor v. Shum*, 1 B. & P. 21; *Onslow v. Corrie*, 2 Madd. 330; *Valliant v. Dode-medé*, 2 Atk. 546.

(*z*) *Barnard v. Godscall*, Cro. Jac. 309.

(*a*) *Parke, B., Humble v. Langston*,

7 M. & W. 530; *Bickford v. Parson*, 5 C. B. 929.

(*b*) *Burnett v. Lynch*, 5 B. & C. 602; *Moule v. Garratt*, L. R. 5 Ex. 132; *ib.* 7 Ex. 101; 39 L. J. Ex. 69; 41 L. J. Ex. 62.

(*c*) *Holford v. Hatch*, 1 Doug. 186; *Earl of Derby v. Taylor*, 1 East, 502.

and benefits of the lessee's covenants are to run with the reversion, notwithstanding severance, in respect of leases made after December 31st, 1881. (*d*)

Covenants Real annexed to Reversionary Estates. — Covenants, however, were held at common law to run with the estate of the lessee only, not with the estate of the reversioner. Consequently, although the assignee of the lessee was held to be entitled to sue upon them, yet the assignee of the reversion had no such remedy, and could not maintain an action upon any express covenants made between the lessor and the lessee in respect of the land. Thus if the owner in fee made a lease, and obtained from the lessee covenants to repair, to manure the lands, or to cultivate them in a particular manner, &c., and then assigned his reversion, the assignee had no title to sue upon these express covenants. This inconvenience led to the passing of the 32 Hen. VIII. c. 34, which places the assignee of the reversion and the lessee and his assignees upon the same footing with respect to each other as that on which the lessor and the lessee and his assignees previously stood at common law, and gives them the same mutual remedies against one another as those previously existing between the lessor and the lessee and his assignees. The assignee of the reversion may consequently sue the lessee or his assignees upon the covenants entered into by the lessee with the lessor; (*e*) and he may himself be sued by the lessee or his assignees upon the covenants entered into by the lessor with the lessee. (*f*) But both the lease and the assignment must be under seal, or the benefit and the burthen of the covenants will not run with the land. (*g*) The assignee may, however, if there is a lease by simple contract for a term not exceeding three years in duration, maintain an action for use and occupation against the lessee or his assignee. (*h*)

And if a tenant holds on under an * assignee of the [* 1278]

(*d*) 44 & 45 Vict. c. 41, sect. 10.

(*e*) *Brett v. Cumberland*, Cro. Jac. 522.

(*f*) *Palmer v. Edwards*, 1 Doug. 186; *Thursby v. Plant*, 1 Wms. Saund. 240; *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*g*) *Beely v. Parry*, 3 Lev. 154; *Elliott v. Johnson*, L. R. 2 Q. B. 120.

(*h*) *Standen v. Christmas*, 10 Q. B. 142; 16 L. J. Q. B. 265; *Bickford v. Paison*, 5 C. B. 929; 17 L. J. C. P. 192.

reversion, and continues in the enjoyment of all the benefits secured to him by his original lease, he may be presumed to have agreed with the assignee to hold upon the same terms as he held under the original lessor. (*i*)

The statute 32 Hen. VIII. c. 34, extends to the assignee of a reversion expectant upon the determination of an incorporeal right, such as a right to dig for and carry away clay granted for a term of years, (*k*) or a right to kill and take game; (*l*) also to the assignee of the reversion of copyhold tenements; (*m*) to the assignee of the reversion of a lease for life as well as for years; (*n*) to the assignee of part of the reversion in all the land; (*o*) and to the assignee of the reversion as to part of the land, though the assignee has not the whole interest in the covenant; (*p*) and where a tenant for life makes a lease in pursuance of a leasing power, the remainder-man is considered to be an assignee of the reversion within the statute. (*q*) But to enable the assignee of the reversion to avail himself of the statute, it was held that there should be what was technically termed a privity of estate between him and the party he sought to charge with the performance of the covenants, *i. e.*, the assignee of the reversion and the party sought to be charged must have been respectively possessed of the estates which the covenantor and the covenantee had in the land at the time the covenants were entered into. If a lessee for a term of ninety-nine years created out of his estate an under-lease for eleven years, leaving in himself the immediate reversion for the remainder of the term, and obtained from the under-lessee covenants to pay rent and repair, and then assigned his immediate reversion for the term to A, who subsequently acquired the ultimate reversion in fee, wherein the reversion for the term became merged, it was held that A, after this merger,

(*i*) *Arden v. Sullivan*, 14 Q. B. 832; 19 L. J. Q. B. 269.

(*k*) *Martyn v. Williams*, 1 H. & N. 817; 26 L. J. Ex. 117.

(*l*) *Hooper v. Clark*, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79.

(*m*) *Glover v. Cope*, 3 Lev. 326; Carth. 205.

(*n*) *Lewes v. Ridge*, Cro. Eliz. 863; *Matures v. Westwood*, ib. 617.

(*o*) *Wright v. Burroughes*, 3 C. B. 685.

(*p*) *Twynam v. Pickard*, 2 B. & Ald. 105; Co. Litt. 215 a; *Badeley v. Vigurs*, 4 Ell. & Bl. 85.

(*q*) *Isherwood v. Oldknow*, 3 M. & S. 382; *Yellowly v. Gower*, 24 L. J. Ex. 297; 11 Exch. 274.

could no longer maintain an action upon the covenants, as the estate to which they were annexed, the reversion for the term immediately expectant upon the determination of the underlease, no longer existed, and that, as the assignee was no longer in possession of the reversion which the covenantee had in the land, the privity of estate was gone, and with it the right of action upon the covenants. (r) But by the 8 & 9 Vict. c. 106, repealing the 7 & 8 Vict. c. 76, it is enacted (sect. 9) that, when the reversion * expectant on a lease shall be sur- [* 1279] rendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements, &c., shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

The assignee must also be the assignee of the legal estate in the land; and whenever it appears upon the face of the deed containing the covenants that the lessor was clothed only with the equitable interest, the benefit and burthen of the covenant do not pass to the assignee; (s) "for there is no estate in law to sustain and carry the covenant. And if one having no estate at all in the land grants a lease to A, who assigns to B, with a covenant for quiet enjoyment, and B assigns over to C, no action lies for C against A, because nothing passed but by estoppel." (t) But whenever an estate by estoppel becomes an estate in interest by the lessor's subsequent acquisition of the estate, the lessor and lessee, and their respective assignees, are clothed with the same rights and liabilities as if the estate had *ab initio* been an estate in interest. (u) And "if a lease be made by indenture in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest, there seems to be no sound

(r) *Webb v. Russell*, 3 T. R. 393.*Whitton v. Peacock*, 2 Sc. 630; 2 Bing.(s) *Pargeter v. Harris*, 7 Q. B. 708; N. C. 411.

15 L. J. Q. B. 113.

(u) *Walton v. Waterhouse*, 2 Wms.(t) *Noke v. Awder*, Cro. Eliz. 436; Saund. 418, n. e.

reason why the assignee should not establish his title by way of estoppel." (x)

Assignees of Grantees of a License to take a profit from the soil of the grantor are as much bound by a covenant respecting the enjoyment of the license, or making compensation for injury done to other land not included in the license, as a lessee and his assignees. (y)

Requisites of the Covenant. — Whether the assignees are named or are not named in the covenant has been said to be wholly immaterial; (z) but the covenant must be "inherent in the land," — that is, the performance or non-performance of it must affect the nature, quality, or value of the thing demised, and its mode of enjoyment, otherwise it does not run [*1280] with the land. Thus where *the lessee in a lease of land, with liberty to make a watercourse and erect a mill, covenanted, for himself and his assigns, not to hire persons to work in the mill who were settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, as it did not immediately affect the nature of the property demised whether the mills were worked by persons of one parish or of another, nor in any degree vary the nature of the property, or the value of it at the end of the term. (a) A covenant by the lessee of a house to account and pay so much for every tun of wine sold in the house, is a collateral and mere personal covenant; (b) and so is a covenant by a lessee with his lessors, who are brewers, to take all his beer of such lessors or their successors in their trade: and such covenants go not with the land or the reversion by assignment. (c) So a proviso for re-entry in case of a conviction under the game laws does not

(x) 1 Smith's L. Cas. 77, 5th ed.; Webb v. Austin, 8 Sc. N. R. 419; Sturgeon v. Wingfield, 15 M. & W. 228; Rennie v. Robinson, 7 Moore, 539.

(y) Norval v. Pascoe, 34 L. J. Ch. 84.

(z) Minshull v. Oakes, 2 H. & N. 809; 27 L. J. Ex. 194. This decision is contrary to the second rule in Spencer's case, and seems to be very doubtful law (see the notes to Spencer's case, 1

Smith's L. C. 57-60, 6th ed., where the case of Minshull v. Oakes is commented upon); and see now 44 & 45 Vict. c. 41, sect. 58, *post*, p. *1281.

(a) Congleton v. Pattison, 10 East, 130.

(b) Godb. pl. 140; Canham v. Rust, 8 Taunt. 227; 2 Moore, 164.

(c) Bayley, J., Doe v. Reid, 10 B. & C. 857.

entitle the assignee of the lessor to re-enter upon such conviction; (*d*) nor does a covenant not to build a public-house within half a mile of the demised premises run with the land. (*e*) But all covenants relating to the cultivation of the demised premises; (*f*) to pay rent, or render suits or services; (*g*) not to assign or underlet or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor; (*h*) to renew the lease; (*i*) to dwell in and upon the demised farm and lands; (*k*) to insure premises situate within the weekly bills of mortality; (*l*) or not to exercise thereon certain specific trades; (*m*) have been held to run with the land; as also covenants to repair the buildings, and to repair, renew, and replace tenants' fixtures and machinery fixed to the premises; (*n*) to discharge the land from all taxes, burthens, &c.; (*o*) to make good damage done by the exercise of a right granted for a term of years to dig for and carry away clay or minerals; (*p*) and to keep on the land a certain quantity of game. (*q*) Where a lessee covenanted to grind at the lessor's mill all the corn that should grow on the demised lands, it was held that this was a covenant which ran with the land, and passed to the assignee of * the reversion as long as the ownership of [* 1281] the lands and the mill remained in the same individual. (*r*) And where a lessor demised a house, excepting two rooms and a free passage thereto, it was held that the exception amounted to an express covenant or grant of a free passage or right of way by the lessee, and would bind the assignees of the term. (*s*) If the lessee covenants not to erect buildings on the land demised, so as to obstruct the lessor's light, or destroy his

(*d*) *Stevens v. Copp*, L. R. 4 Ex. 20; 38 L. J. Ex. 31.

(*e*) *Thomas v. Haywood*, L. R. 4 Ex. 311; 38 L. J. Ex. 175.

(*f*) *Cockson v. Cock*, Cro. Jac. 125.

(*g*) *Stevenson v. Lambard*, 2 East, 575.

(*h*) *Williams v. Earle*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*i*) *Roe v. Hayley*, 12 East, 469.

(*k*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*l*) *Vernon v. Smith*, 5 B. & Ald 1.

(*m*) *Doe v. Keeling*, 1 M. & S. 95.

(*n*) *Williams v. Earle*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*o*) *Dean, &c. of Windsor*, 5 Rep. 24 b; *Martyn v. Clue*, 18 Q. B. 681; 22 L. J. Q. B. 147.

(*p*) *Martyn v. Williams*, 1 H. & N. 828; 26 L. J. Ex. 122; *Norval v. Pascoe*, 34 L. J. Ch. 82.

(*q*) *Hooper v. Clark*, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79.

(*r*) *Vyvyan v. Arthur*, 1 B & C. 415.

(*s*) *Cole's case*, 1 Salk. 196; *Bush v. Calis*, 1 Show. 389; *Carth.* 232.

prospect, or impede the air, this is a covenant which runs with the land, and binds all the assignees of the term. (*t*) Where a vendor conveyed an estate to a purchaser to hold to him and his heirs to the use, intent, and purpose that certain specified trades should not be carried on upon the premises, it was held that there resulted from the stipulation an implied covenant not to carry on the specified trades in the house, which ran with the land, and bound all subsequent purchasers of the premises. (*u*) But a covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beer-shop, does not run with the land. (*x*) If the lessee covenants to build a wall or an outhouse, or to erect a mill or construct dwelling-houses on some part of the demised land, then, although the covenant doth extend to a thing to be newly made, yet, as it is to be made upon the thing demised, the assignee shall take the benefit of it, if he be named. (*y*) But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the covenants shall not extend to the assignee, — “as if the lessee covenants, for himself and his assigns, to build a house upon land of the lessor which is no parcel of the demise;” (*z*) or to repair, renew, and replace mere utensils or movable chattels used in the business carried on in the demised premises, and being there at the time of the demise. (*a*) By the Conveyancing and Law of Property Act, 1881, a covenant relating to land of inheritance or devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if so expressed, and when not so relating or devolving, to be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if so expressed. (*b*)

[* 1282] And a covenant * and a contract, a bond or obligation

(*t*) *Bachelor v. Gage*, Cro. Car. 188.

(*u*) *Hodgson v. Coppard*, 30 L. J. Ch. 20.

(*x*) *Turner*, L. J., *Wilson v. Hart*, L. R. 1 Ch. 463; 35 L. J. Ch. 569.

(*y*) *Smith v. Arnold*, 3 Salk. 4; *Anon.*, Moore, 159, pl. 300; *Sampson v. Easterby*, 9 B. & C. 505; *Easterby v. Sampson*, 6 Bing. 645; 4 M. & P. 601.

(*z*) *Spencer's case*, 5 Co. 16 a; 1

Smith's Lead. Cas. 6th ed. pp. 57-60; *Doughty v. Bowman*, 11 Q. B. 454, qualified and explained, *Minshall v. Oakes*, 2 H. & N. 809; 27 L. J. Ex. 194.

(*a*) *Williams v. Earle*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*b*) 44 & 45 Vict. c. 41, sect. 58.

under seal, except where the contrary is expressed, though not expressed to bind the heirs, is to bind them and the real estate as well as the executors and personal estate. (c) A covenant, &c., with two or more jointly, implies, unless otherwise expressed, an obligation to the survivor, and to any person on whom the right to sue devolves; (d) and where in a mortgage or an obligation, money is advanced by more than one person, or a mortgage or obligation is made to more than one person, the mortgage money is deemed to be money belonging to those persons on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representatives is a discharge, notwithstanding any notice of severance. (e)

Parties entitled to sue — Continuing Breaches. — Lastly, although the covenant is transferred with the land by assignment as appurtenant to the estate, yet an existing breach of such covenant is not transferred. (f) Thus where rent covenanted to be paid was in arrear, and an action was brought to which the defendant pleaded that after the arrearages incurred, and before action brought, the plaintiff had assigned his reversion, it was held, on demurrer, that the right to the arrearages was “a right vested in the plaintiff before the assignment, the which he should not lose by the assignment;” (g) for although the covenant had been transferred with the estate to the assignee, yet it was not so with respect to the right of action which had previously accrued. But as regards what are termed continuing breaches, the assignee may maintain an action as soon as he becomes seised or possessed of the estate to which the covenant running with the land is annexed, — as in the case of a breach of a covenant to repair, where, although the covenant has been broken, and the premises are left out of repair at the time of the assignment, and come so out of repair to the hands of the assignee, yet if they remain so afterward during the continuance of the term, the

(c) Sect. 59. This extends to implied covenants under the act, and only to covenants, &c. made since the act.

(d) Sect. 60. The sect. only applies to covenants, &c. after the act.

(e) 44 & 45 Vict. c. 41, sect. 61, un-

less otherwise provided in the mortgage, &c. The section only applies to mortgages, &c. after the act.

(f) *Lewes v Ridge*, Cro. Eliz. 863.

(g) *Anon.*, Skin. 367; *Midgley v. Lovelace*, Carth. 289; 12 Mod. 46.

covenant is then broken again in the time of the assignee, there being a constant repetition of the breach as long as the acts to be done upon the land remain unperformed. (*h*) But if the covenant is broken, and the lease expires, and then the premises are assigned, the assignee can maintain no action upon the covenant; for the lease being at an end, there is an end of [* 1283] the covenant, which had been broken * once for all, so that the ultimate damage had accrued before the time of the assignee. A breach of a covenant for title is in the nature of a continuing breach as long as the party entitled to the benefit of the covenant is in possession of the land under a defective title; for although if one covenants that "he is lawfully seised in fee, or that he hath a good estate, and hath not, the covenant is broken as soon as it is made," yet, as long as the assignee does not enjoy the land under a good title, "there is a continuing breach; for it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require." (*i*)

Implied Covenants arising from the word "demise" in a lease under seal run with the estate or term of years created in the land, so that the assignee of the lessee, if evicted, has an action thereon against the original lessor. But the law raises no implied covenant from a person who has not the legal estate in the land, as from a mortgagor who has joined a mortgagee in making a lease, (*k*) and from whom no legal interest passes. By the 8 & 9 Vict. c. 106, sect. 4, it is enacted that the word "give" or "grant," in a deed executed after the 1st of October, 1845, shall not imply any covenant in law; but from the word "demise" there is still an absolute covenant for quiet enjoyment. (See *ante*, p. * 909.)

Covenants annexed to the Estate of Joint Tenants and Tenants in Common. — If the assignees have a joint interest in, and are jointly entitled to, the estate to which the covenants are annexed,

(*h*) Mascal's case, 1 Leon. 62; Vivian v. Campion, 1 Salk. 141; 2 Ld. Raym. 1125.

(*k*) Spencer's case, 5 Co. 16 a; Noke's case, 4 Co. 80 b; Smith v. Pocklington, 1 C. & J. 445.

(*i*) Shep. Touch. 170.

they have a joint interest in the covenants, and separate interests when they have several estates ; and a separate and distinct damage will accrue to each from a breach of the covenants. Joint tenants have a joint interest in respect of their joint estate ; but tenants in common have, it seems, when a reversion expectant upon the determination of a lease for years, upon which a rent has been reserved, comes to them, a joint or separate interest in the rent, at their election. (*l*) But in covenants running with the land, and coming to parties either as tenants in common or joint tenants, the interest is joint or several, according as a joint duty arises in favor of all, or separate duties to each. (*m*) If, therefore, the entire reversion is divided among several persons, each possessing a distinct interest in his particular portion, and a breach of covenant takes place affecting the value of the entire * reversion, each of [* 1284] the parties interested has a separate right of action, and the damages will be assessed and apportioned according to their several shares and interests in the subject-matter of the covenant. The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only ; and, therefore, the representatives of all the tenants in common on a lease so jointly made by them have a joint interest in the damages arising from a breach of such covenant. (*n*)

Assignment of Rent and Annuities. — The grant of a sum of money to issue out of the land of the grantor, and to be paid at fixed consecutive periods, for a term of years, for life, or in fee, is in strictness of law a rent. When it is granted to be paid by the grantor and his representatives only, then it is an annuity. As, however, both the land and the personalty are generally made liable to the payment of the money, the term “annuity” has been indiscriminately used to signify both the charge on the person and the charge on the land, which, as the rights and properties by law incident to the one and the other are altogether different, is apt to create some confusion and misconcep-

(*l*) *Marten v. Crompe*, 1 *Ld. Raym.* 13 *C. B.* 479 ; *Simpson v. Clayton*, 4 *341* ; *Harrison v. Barnby*, 5 *T. R.* 246. *Bing. N. C.* 758.

(*m*) *Kitchen v. Buckley*, 1 *Lev.* 109 ; (*n*) *Thompson v. Hakewell*, 19 *C. B.* *Magnay v. Edwards*, 22 *L. J. C. P.* 170 ; *n. s.* 713 ; 35 *L. J. C. P.* 18.

tion concerning them. (o) A rent or sum of money issuing out of land is a direct interest in realty in possession, and was assignable by the common law; but an annuity or sum of money granted to be paid by the grantor and his representatives only, issuing therefore out of personalty, or, as it has been termed, "the coffers of the grantor," and not charged upon or issuing out of the land, was a mere personal contract or chose in action, and could not, therefore, be assigned so as to give the assignee a right of action for it in his own name. (p) When both the person and the land of the grantor were made liable to the payment of the money, the grantee had an election either to bring a writ of annuity, and, charging the person, to make the grant personal only, or by distraining on the land, to make it real; but he could not have both the one and the other; for the writ of annuity having been once brought, the land was thenceforth discharged. So long, however, as the election had not been made, the rent passed with all its legal rights and incidents to the assignee, who, standing in the shoes of the grantee, had the same right of election as between the land and the person, and might, by suing out a writ of annuity, release the land, and turn the charge entirely on the person of the grantor. (q) As, however, no personal action other than the writ of annuity [* 1285] could be maintained in respect of a rent * granted for life or in fee, so long as the estate of freehold had continuance, (r) there being remedies of a higher and more summary nature by way of distress and assize, no right of action could be transferred to the assignee of a freehold rent; but when the rent was granted for a term of years, then, as an action of debt might be maintained for the recovery of such rent, such right of action would pass to the assignee as incident to the interest in the land granted. (s)

Rent reserved on a lease for years might at common law be severed from the reversion, and assigned so as to give the

(o) Doct. & Stud. Dial. 1, c. 30.

(r) Webb v. Jiggs, 4 M. & S. 113;

(p) Co. Litt. 144 a; 144 b; Maund's case, 7 Co. 28 b; Gerrard v. Boden, Hetl. 80; Baker v. Brook, 1 Dy. 65 a.

Randall v. Rigby, 4 M. & W. 130.

(s) Browne v. Pendlebury, Cro. Eliz. 268; Gilbert's Rents, 93.

(q) Bac. Abr. Rent (K), 2; Co. Litt. 144 b.

assignee an action of debt for the arrears. (t) Where premises were demised for a term of years by an indenture of lease containing covenants by the lessee for the payment of rent, and subsequently the rent, and the counterpart of the lease, and the benefit of the covenants, were assigned, it was held that the assignee might maintain debt against the lessee for the recovery of the rent. (u) But although the remedy by action of debt for the recovery of the specific sum payable out of the land passed to the assignee as incident to the direct interest in the land assigned, yet nothing in the shape of contract passed by the assignment, and the assignee had no remedy upon any contract or stipulation made concerning the land, or for better securing the payment of the rent, and could maintain no action of covenant; for a covenant cannot run with a RENT. Thus where the defendant covenanted with Barnsley to pay him, his heirs and assigns, a certain rent to be issuing out of the land of the defendant, and covenanted to build one or more messuages on the land for better securing the payment of the rent, it was held that this covenant was a mere personal covenant, operative only between the immediate parties thereto and their privies, and that the assignee of the rent had no title to maintain an action upon the covenant, either for the non-payment of the rent, or for not building the messuages, (x) or for non-repair. (y)

(t) *Newcomb v. Harvey*, Carth. 161; *Wilston v. Pilkney*, 2 Lev. 80; Ventr. 242; *Cartwright v. Pilkney*, Ventr. 272; *Ards v. Watkin*, Cro. Eliz. 637. (x) *Milnes v. Branch*, 5 M. & S. 411; *Brewster v. Kitchin*, 1 Ld. Raym. 318; *Spencer's case*, 1 Smith's L. C. 74, 5th ed. *in notis*.

(u) *Allen v. Bryan*, 5 B. & C. 512; *Williams v. Hayward*, 28 L. J. Q. B. 374; 1 El. & El. 1040. (y) *Haywood v. Brunswick Building Soc.*, 8 Q. B. D. 403.

[* 1286]

* SECTION II.

TRANSFER BY DEATH.¹

Rights of Heirs upon Real and Personal Covenants and Simple Contracts entered into with their Ancestors.— Real contracts, or covenants running with the land, annexed to an estate of inheritance, descend with the land, in case of death, to the heir at law, not only without his being named in the covenant, but also where the covenant is made with the covenantee and his executors. (a) The heir at law also represents his ancestor upon such personal covenants as relate to the freehold, and affect the value of the inheritance. Thus if a man covenants with another and his heirs to enfeoff him and his heirs of the manor of D, and will not to do it, and he to whom the covenant is made die, his heir will have a right of action upon the deed. (b) If three co-partners purchase land in fee, and mutually covenant, each with the other of them and their heirs, that the survivors shall convey to the heirs of such as shall die first, the heir of a deceased covenantee may maintain an action upon the covenant, (c) the principle established being that, if the heir at law would have had the benefit of whatever would have accrued from the performance of the covenant, he shall have the damages that accrue from the non-performance. So where a contract for the purchase of land is entered into between an intestate and another person, and it has not been completed at the intestate's death, but is capable of being enforced, the money and the land are to go as if the contract had been actually carried into execution, and the heir at law is entitled to have either the land or the money which would have been applied in the purchase of the

¹ See U. S. Dig. tit. *Executors, &c.*, II. 1, and III. i. A.; Ann. Dig. 1870-78, tit. *Executors, &c.*, II. III.; ib. 1879, &c., tit. *Executors, &c.*, II. a, b.

(a) *Lougher v. Williams*, 2 Lev. 92.

(c) *Wotton v. Cook*, Dy. 337 b.

(b) *Fitz. N. B.* 145 c; *Touch.* 175.

land under the intestate's contract. (*d*) So where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held that the heir at law was entitled to have the house finished at the expense of the personal estate. (*e*)

Where there is a contract enforceable against an heir or devisee for sale of a freehold interest descendible to heirs general, the deceased's personal representatives have power to convey the land, but such conveyance is not to affect the beneficial rights of any person. (*f*)

* **Of the Heir's Right of Action in Respect of Continuing Breaches of Real Covenants.** — [* 1287] When a real contract or covenant running with the land has been broken in the lifetime of the ancestor, and the breach remains a continuing breach in the time of the heir at law, the latter is the only party who can maintain an action in respect thereof, if no actual damage has resulted to the personal estate. (*g*) Where the plaintiff, as executrix, declared that the defendant, by deed conveying to her testator certain lands, covenanted with the testator that he was seised in fee, and had a right to convey, &c., and assigned for breach that the defendant was not seised in fee, and had not a right to convey, &c., it was held that the executrix could not maintain an action for such breaches, without showing some special damage to the testator in his lifetime, as any damage that accrued after his decease would be a matter which concerned the heir. (*h*) And where a vendor of land executed a conveyance, professing to convey an estate in fee in the land, and covenanted with the vendee and his heirs for further assurance on request, and a request was made by the vendee in his lifetime to have a fine levied by the vendor for better assuring the estate granted, but no fine was levied, in consequence whereof the heir at law of the vendee, after the death of the latter, who quietly enjoyed the estate during his life, was evicted, and brought his action for the damages consequent thereon, it was held that as the ultimate

(*d*) *Hudson v. Cook*, L. R. 13 Eq. 417; 41 L. J. Ch. 306.

(*e*) *Cooper v. Jarman*, L. R. 3 Eq. 98; 36 L. J. Ch. 85.

(*f*) 44 & 45 Vict. c. 41, sect. 4 (1),

(2). The section only applies to cases of death after 31 Dec. 1881.

(*g*) *Vivian v. Campion*, 2 Ld. Raym. 1125.

(*h*) *Kingdon v. Nottle*, 1 M. & S. 355.

damage had been sustained by the heir at law, he was the proper party to maintain the action. (i)

Where, however, the ancestor was himself evicted, it was held that, the eviction being to the ancestor, he could not have an heir or assignee of that land, and so the damages belonged to the executors, though not named in the covenant, and nothing descended to the heir. (k) So where by the breach of a covenant for title, the estate of the ancestor has been actually divested, the personal representative is the only party who can maintain an action upon the covenant. (l)

Right of Action of the Personal Representatives. — With respect to breaches of real contracts not in the nature of continuing breaches, where the covenant having been broken is broken once for all, and the entire and ultimate damage has accrued, such damage, if it results in the time of the ancestor, survives to his personal representative. (m) Such must have been [*1288] the case * where the plaintiff brought an action as executor of the Bishop of Winchester, and alleged in his declaration that Brian, the predecessor of the bishop, his testator, had demised a rectory and certain lands to S for twenty-one years, who had assigned the lease to the defendants, and that the lessee covenanted with Brian and his successors to repair the chancel of the church, the barns, &c., and assigned as a breach the not repairing thereof in the life of the bishop, the plaintiff's testator, and averred that the lease afterward expired, when it was held that the executor was entitled to maintain the action. If the lease, in this case, expired in the lifetime of the bishop, the plaintiff's testator, the covenant ceased, no further breach of it could be committed, the ultimate damage was then sustained, and that damage having accrued in the lifetime of the testator, it would be properly sued for by his executor. (n) If the lease had not then expired, the executor could not have maintained the action except in respect of some actual damage resulting from the breach to the personal estate of his testator, inasmuch

(i) *Jones v. King*, 4 M. & S. 188.

(m) *Ricketts v. Weaver*, 12 M. & W.

(k) *Lucy v. Levington*, 2 Lev. 26; 1

718.

Ventr. 175.

(n) *Morley v. Polhill*, 2 Ventr. 56.

(l) *Kingdon v. Nottle*, 1 M. & S. 363.

as there would be a continuing breach as long as the covenant remained in force and unfulfilled, and the succeeding bishop to the testator would consequently, on becoming seised of the reversion, be entitled to sue the lessee upon his covenants, and to recover as much damages as would suffice to put the premises into repair; and if the executor could sue upon the covenant as well as the heir or the successor, except in respect of some special damage to the personal estate of the testator, the lessee would be harassed with two actions for the breach of one and the same duty, which the law will not suffer.

If a man covenants not to cut down certain trees growing on the land of the covenantee, and afterward fells them in the lifetime of the latter, the personal representative is the proper party to maintain an action for the breach, as the entire damage has accrued, and the covenant has been broken, "once for all," before the time of the heir at law. There can be no continuing breach of such a covenant; and the right of action, therefore, remains with the personal representative as part of the personal estate. (o) And if a man enters into a covenant with the testator to discharge the testator's land from incumbrances, the executor is the proper party to maintain an action to recover damages for whatever breaches are committed in the lifetime of the testator, such breaches constituting separate and distinct causes of action, and operating as a direct injury to the personal estate. (p)

So with * regard to the breach of a covenant to pay [* 1289] rent, although the covenant when annexed to an estate of inheritance descends with the land to the heir at law, yet all the arrearages that have accrued up to the death of the ancestor are only to be sued for by the personal representative. In these cases, each breach is entire, giving a separate and distinct right of action; and although the covenant is transferred with the estate, yet it is not so with the breaches and consequent right of action that have previously accrued. (q)

Transfer of Trust and Mortgage Estates on Death. — By the Conveyancing and Law of Property Act, 1881, (r) sect. 30, pro-

(o) *Raymond v. Fitch*, 2 C. M. & R. 588.

(p) *Smith v. Simonds*, Comb. 64.

(q) *Midgley v. Lovelace*, Carth. 289.
(r) 44 & 45 Vict. c. 41. sect. 30.

vision is made for the devolution (notwithstanding any devise to the contrary) of trust and mortgage estates upon the personal representatives of the deceased, with all the consequences of such devolution. (s)

Transfer of Covenants annexed to Estates pur Autre Vie. — If an estate is holden during the life of another, and the grantee or assignee of such estate dies in the lifetime of the *cestui que vie*, the estate will pass to the heir at law or the personal representatives of the grantee *pur autre vie*, according as he or they may or may not be named in the deed or instrument of conveyance. If the estate *pur autre vie* is limited to the grantee or lessee and his heirs, the heir will take as special occupant on the death of the grantee, living *cestui que vie*, because he is included by name in the grant. If, on the other hand, the estate is limited to the grantee and his executors, the personal representative will take; for although it is a freehold, which by the common law would not go to executors, yet they may be designated by name, so as to take as special occupants. (t) And now, if the estate is granted or assigned to the party generally, without words of limitation, the personal representative will take the estate by force of the statute, (u) and be entitled to the benefit of the performance of all covenants annexed thereto. If the owner of an estate *pur autre vie* which has been granted to him, his heirs and assigns, bequeaths the estate to A and his assigns, and A dies intestate in the lifetime of the *cestui que vie*, the premises will pass to A's personal representative under the statute, and not to his heir at law. (x)

Transfer of Covenants annexed to Leasehold Estates and Interests. — All real contracts or covenants running with [* 1290] the land, * annexed to reversions for terms of years, leases, and chattel interests in land, pass, together with the estates to which they are annexed, to the personal representatives of the deceased covenantor. (y) No mere words of limita-

(s) The section applies only in cases of death after the commencement of the act. (B), 3; *Carpenter v. Dunsmure*, 3 Ell. & Bl. 918.

(t) *Doe v. Robinson*, 8 B. & C. 296; Bac. Abr. *Estates for Life and Occupancy* c. 26, sect. 6. (u) 29 Car. II. c. 3, sect. 12; 1 Vict. c. 26, sect. 6.

(x) *Doe v. Lewis*, 9 M. & W. 662.

(y) Co. Litt. 46 b; 388 a.

tion can vary the course of succession of a chattel interest. If a lease for years is made to a man and his heirs, or a term of years is limited to him and the heirs of his body, or the heirs male of his body, it will go to his executors. (z) So if a lease for years is granted to a bishop, parson, or other sole corporation, and his successors, it passes, on the death of the lessee, to his personal representatives, and not to his successors; succession in a body politic being inheritance, as in the case of a body private. (a) No estate of freehold can be created out of a term of years. If, therefore, a lessee for years makes a lease for life, it is a chattel interest. (b) If a person holds lands as tenant by statute merchant, statute staple, or *elegit*, he also has a chattel interest only, which passes to his personal representative. (c) Whatever covenants, therefore, are annexed to such estates and interest in the land, pass to the personal representative as the assignee in law of the covenantor; and he alone can maintain an action upon them.

The Executor or Administrator is alone entitled to sue upon All Bonds and Personal Covenants and Simple Contracts entered into with the testator or intestate, and to recover debts of record due to him, such as judgments, statutes, or recognizances, or debts due on specialties. (d) And so completely does the executor or administrator represent the testator or intestate, in respect of his personal contracts, that if a bond or other personal obligation under seal is made to a man and his heirs, the executor or administrator is the only party who can maintain an action upon the instrument. (e) But if a bond is conditioned to pay money to such person as the testator shall by will appoint, and the testator makes no appointment, the representative has no claim to the money, as he is not the appointee contemplated by the bond. (f) The right of action upon all simple or parol contracts entered into with the testator or intestate, whether they be or be not made concerning land, is transferred to the executor or ad-

(z) Leonard Lovie's case, 10 Co. 87 b;
Leventhorpe v. Ashbre, 1 Roll. Abr. 611.

(a) Fulwood's case, 4 Co. 65 a; How-
ley v. Knight, 14 Q. B. 240; 19 L. J.
Q. B. 3.

(b) Butt's case, 7 Co. 23 a.

(c) Co. Litt. 42 a; 2 Saund. 68; 2
Inst. 396.

(d) Com. Dig. Administration (B),
13; Vin. Abr. Executors.

(e) Devon v. Paulett, 11 Vin. Abr.
133, pl. 27.

(f) Pease v. Mead, Hob. 9.

ministrator; (*g*) and so also is the right of action upon all bills of exchange, promissory notes, and negotiable securities payable to * the testator or intestate. (*h*) The executor is entitled to indorse and negotiate all notes payable to the order of the testator; and if the testator has indorsed such a note in his lifetime for a valuable consideration, but has neglected to deliver it to the indorsee, the latter is entitled to call upon the personal representative for an indorsement of the note. (*i*) Where a passenger on a railway is injured by an accident, and after an interval dies in consequence, his executor may recover in an action for breach of contract against the railway company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business; (*k*) but the executor cannot recover such expenses where the action is founded in *tort*. (*l*)

The Personal Representative is entitled to the Benefit of all such of the Executory Contracts of the Deceased as he can fairly and efficiently fulfil; and, therefore, if a man builds half a house, or makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete and deliver them, and sue either for work and labor done by them, or for goods sold and delivered by them as executors. (*m*) When, however, the contract is founded upon the known skill of the deceased, or his peculiar talents and intellectual capabilities and acquirements, it is determined by his death. If a publisher, for example, agrees to pay some celebrated poet or author a fixed sum of money for a poem or treatise, and the writer dies before he has completed his task, the contract is absolutely determined, and the publisher is not bound to pay any part of the stipulated remuneration, unless he has accepted and used some portion of the work; in which case he will be liable upon the ordinary implied promise in respect

(*g*) *Orme v. Broughton*, 10 Bing. 533; 4 M. & Sc. 417; *Knights v. Quarles*, 4 Moore, 532; *Bishop v. Curtis*, 18 Q. B. 878.

(*h*) *Timmis v. Platt*, 2 M. & W. 720; *Murray v. E. I. Co.*, 5 B. & A. 216.

(*i*) *Watkins v. Maule*, 2 Jac. & Walk. 243.

(*k*) *Bradshaw v. Lancashire & York-*

shire Ry. Co., L. R. 10 C. P. 189; *Leggott v. Gt. Northern Ry. Co.*, 1 Q. B. D. 599.

(*l*) *Pulling v. Gt. Eastern Ry. Co.*, 9 Q. B. D. 110.

(*m*) *Werner v. Humphreys*, 2 M. & G. 853; 3 Sc. N. R. 226; *Marshall v. Broadhurst*, 1 Cr. & J. 405; *Collinson v. Lister*, 20 Beav. 365.

of a benefit actually received. But although determined, the contract is not rescinded so as to take away a right of action already vested; and therefore where an engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period the sum of £500, by equal quarterly instalments, and shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid, it was held that, although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and that his *ad- [*1292] ministrator was therefore entitled to recover them, and not merely to sue upon a *quantum meruit* for the value of the amount of the work actually done. (n) Contracts of apprenticeship, founded upon personal instruction on the one side, and the render of work and service, on the other, have been held to be discharged and put an end to by the death of either party; (o) but most contracts of apprenticeship are regulated by statute, or by the custom of trade in particular districts; and the executors, in some places, are bound to assign the apprentice to another master. If the master has covenanted in the usual way to find the apprentice in meat, drink, and other necessaries during the term of apprenticeship, the death of the master is no discharge of this covenant, but the personal representatives are bound to perform it, so far as they have assets. (p)

Liability of the Heir at Law and Devisees. — The heir at law was liable at common law to an action for a breach of a covenant annexed to a reversionary estate which had descended to the heir. (q) The heir at law was also liable, in common with the personal representative, to the extent of the assets which had come to him by descent, upon all contracts under seal entered into by the ancestor in which he was expressly named, but not otherwise. (r) If there was a devisee of the real estates of a

(n) *Stubbs v. Holywell Ry. Co.*, L. R. 2 Ex. 311; 36 L. J. Ex. 166.

(o) *Baxter v. Burfield*, 2 Str. 1266.

(p) *Wadsworth v. Guy*, 1 Sid. 216; *R. v. Peck*, 1 Salk. 65; *Walker v. Hull*, 1 Lev. 177.

(q) *Derisley v. Cistance*, 4 T. R. 75.

(r) *Dyke v. Sweeting*, Willes, 585;

Bac Abr. *Heir* (F); Co. Litt. 209 a;

and see the notes to *Jeffreson v. Morton*,

2 Wms. Saund. 7 b.

debtor (not being a devisee for payment of debts, or in pursuance of an ante-nuptial marriage contract), such devisee was not liable at common law, but might, by the 11 Geo. IV. and 1 Wm. IV. c. 47, be sued jointly with the heir upon all contracts under seal made by the ancestor and devisor in which the heirs were named, and whereby the ancestor or devisor became indebted, in his lifetime, to the covenantee or obligee. If there was a devisee and no heir, then the action lay against the devisee only. The heir was not, at common law, responsible upon any simple contract entered into by the ancestor, whether he was or was not named therein, or whether he had or had not assets by descent; but the legislature has by various statutes made all the real estate of every debtor assets for the payment of every kind of debt. (s) If the heir has sold or conveyed away the lands that have descended to him before the commencement of the action, the lands cannot be charged in the hands of a [* 1293] *bona fide* alienee, (t) but the heir is, * nevertheless, responsible to the extent of the full value of such lands; (u) and if assets by descent vest in the heir, the charge continues to run against his heir taking the same assets. (x) By the 17 & 18 Vict. c. 113, sect. 1, it is enacted that where a mortgagor of land dies without providing by his will for the satisfaction and discharge of the mortgage debt out of his personal estate, the heir or devisee to whom the mortgaged land descends, or to whom it has been devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of the mortgagor, but the mortgaged land shall, as between the different persons claiming through the deceased mortgagor, be primarily liable to the payment of the mortgage debt with which the same shall be charged, every part of such land according to its value bearing a proportional part. (y) And by the 30 & 31 Vict. c. 69, sect. 1, it is provided that in construing the will of any person dying after

(s) *Fleming v. Buchanan*, 22 L. J. Ch. 886; *Homer, Ex parte*, 21 L. J. Ch. 832; 3 & 4 Wm. IV. c. 104; 32 & 33 Vict. c. 46.

(t) *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

(u) 11 Geo. IV. & 1 Wm. IV. c. 47, sects. 3, 4, 6; *Farley v. Briant*, 3 Ad. & E. 846.

(x) *Anon.*, Dyer, 368 a, pl. 46.

(y) See *Leonimo v. Leonimo*, 10 Ch. D. 460.

the 31st of December, 1867, a general direction for the payment of debts out of the personalty is not to include mortgage debts, unless a contrary intention is expressed or necessarily implied. And by sect. 2, the word "mortgage" in that act and the 17 & 18 Vict. c. 113, is to extend to any lien for unpaid purchase-money upon any land or hereditament purchased by a testator. (z)

Liabilities of Executors and Administrators on Covenants for the Payment of Rent.—The personal representative of a deceased lessee or termor is, in contemplation of law, the assignee of the term, and is liable, as such, upon all covenants running with the land annexed to leases and chattel interests, (a) to the extent of the assets in his hands, although he does not enter upon, or take possession of, the demised premises. (b) If he enters and takes possession, he then becomes *prima facie* chargeable *de bonis propriis* for the full amount of the rent; but if the annual value of the property is less than the rent, he is then personally responsible only to the extent of the actual annual value; but he continues liable, in his representative character, to the extent of the assets in his hands, for the proportion of the rent which exceeds the annual profits, or what the land is worth to let. (c) If the rent is of less value than the lands, which the law *prima facie* *supposes, [* 1294] so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and no other payment out of the profits can be justified till the rent is answered. On the other hand, if the rent is more than the land is worth, the profits must be appropriated to its discharge as far as they will go. (d) The personal representatives cannot rely on any deterioration in value which has resulted from non-performance of covenants which ought to have been fulfilled by them. (e)

(z) The section does not apply to the case of contracts entered into by intestates. *Harding v. Harding*, L. R. 10 Ch. 567.

(a) *Spencer's case*, 5 Co. 17 b; *ante*, p. * 1275.

(b) *Howse v. Webster*, Yelv. 103.

(c) *Rubery v. Stevens*, 4 B. & Ad. 241; 1 N. & M. 185; *Wollaston v. Hake-*

will, 3 M. & Gr. 297; 4 Sc. N. R. 614; *Hopwood v. Whaley*, 6 C. B. 744; 18 L. J. C. P. 43.

(d) *Buckley v. Pirk*, 1 Salk. 316; 1 Wms. Saund. 112, n. (c); *Jevens v. Harridge*, 1 Saund. 1, n. (1).

(e) *Hornidge v. Wilson*, 11 Ad. & E. 655.

Covenants to Repair. — If the executor has entered and taken possession of leasehold premises, he will become personally responsible *de bonis propriis*, to the extent of the entire damage resulting from the breach of a covenant to repair, whether the profits derived from the premises are or are not adequate to meet the costs of repairing. (*f*)

After an Assignment of the Term, whether made by the lessee in his lifetime, or by the executor after his decease, the executor cannot be charged upon the covenants of the lease as assignee of the estate; but he still remains liable upon the privity of contract (*ante*, p. * 1274). (*g*) If he has himself assigned the lease, he is chargeable as assignee, in respect of breaches of covenants that accrued during the time the term was vested in him, but not for breaches committed afterward. The executor of the lessee always remains liable, in his representative character, to the extent of the assets in his hands, and may be sued as executor upon the covenants contained in the lease, notwithstanding the assignment of the term; and if the lessor has assigned his reversion, the action may be brought against him by the assignee of the reversion; "for by the express words of the 32 Hen. VIII. c. 34, such remedy as the lessor might have had against the lessee or his executors, such remedy the assignee of the lessor shall have against them." (*h*) Hence the executor of a lessee who has contracted to sell the lease, is entitled to require, and ought to obtain, from the purchaser, an indemnity against the payment of rent and performance of covenants. (*i*) But the personal representative of an assignee of the lease is exonerated from all liability after an assignment of the term. The assignee may, as we have already seen, get rid of his liability upon the covenants by simply assigning his estate; and the same power of [* 1295] * release is naturally possessed by his personal representative. (*k*) The executor of an assignee of a lease who has covenanted to indemnify the assignor for breaches of the covenants of the lease, is not bound to retain the proceeds of

(*f*) *Tremeere v. Morrison*, 4 M. & Sc. 613; *Sleep v. Newman*, 12 C. B. 523. n. s. 116.

(*g*) *Helier v. Casebert*, 1 Lev. 127; *Coghil v. Freelove*, 3 Mod. 326.

(*h*) *Brett v. Cumberland*, Cro. Jac.

(*i*) *Staines v. Morris*, 1 Ves. & B. 8.

(*k*) *Rowley v. Adams*, 4 Myl. & Cr. 542.

a sale of the lease to form a fund for indemnification in respect of some possible future breach of the covenant by his testator. (*l*)

Liabilities of Executors upon Personal Contracts. — The personal representatives are responsible, to the extent of the assets that come to their hands, upon all the contracts of their testator or intestate, whether they are deeds or contracts by record, or simple contracts, and whether the “executors or administrators” are named in the contract, or whether they are not, and whether the breach has been incurred in the lifetime of the testator or intestate, or after his decease. They are liable even where the heir is named, and the executors are not named, in the contract. They are liable to pay calls and subscriptions upon covenants and subscription contracts made by their testator, so long, at all events, as they are in possession of the shares held by the testator; (*m*) but they are not bound to reserve funds for the payment of calls that may or may not be made.

Administration of Assets. — The 22 & 23 Vict. c. 35, sect. 27, which is retrospective in its operation, (*n*) contains provisions limiting the liability of executors and administrators upon covenants or agreements contained in any lease or agreement for a lease after an assignment thereof, and for a distribution of assets after setting aside a certain fund to answer claims on such covenants. And an executor who has distributed the assets of his testator after taking the steps pointed out by the act, will have the same protection as if he had administered the estate under a decree of court. (*o*) Formerly the assets must have been applied first in satisfaction of the judgment-creditors of the testator or intestate, and then in payment of debts due from him on contracts of record and contracts under seal, and debts due for rent, whether reserved by deed or by simple contract, and lastly, in satisfaction and discharge of simple contract debts. (*p*) But

(*l*) *Collins v. Crouch*, 13 Q. B. 547; 226; *Heward v. Wheatley*, 22 L. J. Ch. 435.

and see, further, as to the liability of executors and administrators upon covenants contained in leases, the 22 & 23 Vict. c. 35, sect. 27, *infra*.

(*m*) *Wills v. Murray*, 4 Exch. 863; *Birk., Lanc., &c. v. Cotesworth*, 5 ib.

(*n*) *Dodson v. Sammell*, 1 Drew. & Sm. 575; 30 L. J. Ch. 799.

(*o*) *Clegg v. Rowland*, L. R. 3 Eq. 368.

(*p*) *Williams, Executors*, 848-894; *Vincent v. Godson*, 24 L. J. Ch. 122.

now, by the 32 & 33 Vict. c. 46, it is provided that in the administration of the estate of every person who shall die on or after the first day of January, 1870, no debt or liability [* 1296] of such * person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: provided always that this act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt. Rent is a specialty debt within the act, and ranks with simple contract debts. (q) If the liability upon a covenant is contingent, and may or may not come into existence, the executor cannot reserve funds to meet the probable liability, but must pay the specialty or simple contract debts which have actually accrued. (r) When lands have been mortgaged by the deceased, the mortgaged property is, as we have seen, primarily liable to the payment of the mortgage debt charged thereon. When a will contains a direction to the executor to pay the testator's debts, and then a devise of real estate to that executor, the real estate so devised is charged with the debts. (s) If the executor pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer the superior debt out of his own estate, if he had notice of the existence of the last-named debt at the time he made the payment; but if he had no notice of its existence, he cannot then be charged *de bonis propriis*; for it is the creditor's own fault not to have made a prompt application to the executor for payment. (t) It must be observed, however,

(q) *In re Hastings*, 6 Ch. D. 610.

(r) *Henderson v. Gilchrist*, 22 L. J. Ch. 970.

(s) *Harris v. Watkins*, 23 L. J. Ch. 541; *Wrigley v. Sykes*, 25 L. J. Ch. 458.

(t) *Harman v. Harman*, 2 Show. 478;

Bac. Abr. *Executors* (L), 2; 22 & 23 Vict. c. 35, sect. 29; *Rock v. Leighton*, 1 Salk. 310; *Britton v. Bathurst*, 3 Lev. 114; 1 Saund. 333 a, n.; *Davies v. Monkhouse*, Fitzgib. 76; *Sawyer v. Mercer*, 1 T. R. 690.

that the personal representative has notice of all judgment debts recovered against himself, and will pay debts of inferior degree at his own peril; (*u*) but as regards judgment debts recovered against the testator or intestate, and of which he may have had no notice, these must be docketed or registered pursuant to the statutes in that behalf, (*x*) before he can be made liable for a *devastavit* in paying simple contract debts before them. Where the executors of a shareholder in a company, which was a going concern at the time of *the testator's [* 1297] death, paid a legacy under his will without leaving assets to meet any liability in respect of shares which they retained unsold, they were held liable as contributories to pay the amount of the legacy in satisfaction of calls. (*y*)

The executor has a right to pay creditors of equal degree in any order he may think fit, and to sell or mortgage the assets for that purpose, (*z*) unless one of such creditors has obtained judgment for his debt. (*a*) He has a right to retain for his own debt in preference to all other debts of equal degree; and he may, after actions are commenced against him by a creditor on simple contract, confess a judgment in favor of another creditor of equal degree, and thus give the latter a preference. (*b*) Process need not have been issued by the creditor to whom the judgment is confessed; but the judgment must be confessed to a *bona fide* creditor, and must be confined to the debt really due to him. (*c*) If the executor sets up the defence of *plene administravit*, the question will be whether or not there are assets in his hands available for the payment of the creditor, (*d*) and if in the distribution of assets, a creditor misleads an executor either by *laches* or by express authority, so as thereby to induce the exec-

(*u*) Littleton v. Hibbins, Cro. Eliz. 793.

(*x*) 23 & 24 Vict. c. 38; 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 27 & 28 Vict. c. 112; Williams, *Executors*, 886; Gaunt v. Taylor, 3 M. & Gr. 886; 3 Sc. N. R. 700; Jennings v. Rigby, 33 Beav. 198; 33 L. J. Ch. 149; *In re Williams*, L. R. 15 Eq. 270.

(*y*) Taylor v. Taylor, L. R. 10 Eq. 477; 39 L. J. Ch. 676.

(*z*) Earl Vane v. Rigden, L. R. 5 Ch. 663; 39 L. J. Ch. 797.

(*a*) See the 32 & 33 Vict. c. 46, *ante*, p. * 1292.

(*b*) Lyttleton v. Cross, 3 B. & C. 322; Cockroft v. Black, 2 P. Wms.² 298; Wynch v. Grant, 24 L. J. Ch. 6; 2 Drew. 312.

(*c*) Tolputt v. Wells, 1 M. & S. 404.

(*d*) Cooper v. Taylor, 6 M. & G. 989.

utor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets. (e) If two actions have been brought against the executor by two several creditors standing in the same degree, and the executor has pleaded *plene administravit præter* a certain sum to one action, he may plead in bar to the action by the other creditor *plene administravit præter* the same sum, and as to that sum that he has confessed it in another action; and the plaintiff in the second action can then only obtain judgment of assets *quando acciderint*. (f) The executor of a deceased incumbent is by custom bound to satisfy and discharge all the debts, both specialty and simple contract debts, of the deceased, before he satisfies claims for dilapidations. (g) It would seem, however, that the effect of the 34 & 35 Vict. c. 43, sect. 36, which makes the claim for dilapidations, as ascertained by that act, a debt due from the late incumbent, his executors or administrators, to the new incumbent, has been to place claims for dilapidations on an equal footing with simple contract debts, — a position [* 1298] which they seem to have *previously held in the administration of equitable assets by the Court of Chancery. (h)

Liability of Personal Representatives on Executory Contracts of the Deceased. — If a purchaser who has ordered goods dies before the time of delivery, his executor or administrator must receive them and pay for them, or make good the damage sustained by his refusal to accept, to the extent of the assets in his hands. (i) If a testator has agreed to build a house by such a day, or to pay a certain sum as liquidated damages for the default, his executor is bound either to build the house or to pay the money. (k)

Joint Liability of Executors and Administrators. — If there are several executors or administrators, they are jointly liable

(e) *Richards v. Browne*, 3 Bing. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98, N. C. 493. 100; 36 L. J. Ch. 85.

(f) *Waters v. Ogden*, 2 Doug. 455.

(g) *Bryan v. Clay*, 1 Ell. & Bl. 38; 22 L. J. Q. B. 23.

(h) *Burgess v. Bissett*, 2 Jur. n. s. 1221.

(i) *Wentworth v. Cock*, 10 Ad. & E.

(k) 15 H. VII. f. 13; *Quick v. Ludbarrow*, 3 Bulstr. 30; *Parke, B.*, 1 M. & W. 423; *Marshall v. Broadhurst*, 1 Cr. & J. 405; *Collinson v. Lister*, 20 Beav. 365.

in case they have all proved the will or administered. (*l*) And when one of several executors to whom probate has been granted is an infant, he is liable in his representative character, and may be sued jointly with the adult executors upon the contracts of the testator. (*m*)

Executor de Son Tort.— If one who is neither executor nor administrator intermeddles with the goods of the deceased in this country, and does acts appertaining to the office of an executor, he makes himself what is called in law an executor *de son tort*, or an executor of his own wrong, and becomes clothed with all the liabilities that appertain to the office of an executor, and may be sued as executor by the creditors of the deceased, although there is a lawful executor; (*n*) but a person does not make himself an executor *de son tort* by taking possession of property of a deceased person situate abroad. (*o*) There are many acts, however, which a stranger may do without incurring the hazard of being considered executor *de son tort*, such as giving directions for the funeral of the deceased, making an inventory of his effects, providing necessaries for his children, and the performance of such deeds of charity and kindness as are due from one neighbor or friend to another. The intermeddling must be an uncalled for and officious intermeddling with the estate of the deceased. The nature of the acts and the degree of interference which will constitute a party executor of his own wrong are questions of law for the court; but it is a question of fact whether the acts creating the liability have been
* done by the party sought to be charged. (*p*) The [* 1299] executor *de son tort* and the lawful executor may be joined as defendants in the same action, or they may be sued separately; but a wrongful executor and rightful administrator cannot be made joint defendants. (*q*) The executor *de son tort* may be made responsible upon the contracts of the deceased to the extent of the assets which have come to his hands, but no

(*l*) Com. Dig. *Administration* (B), 12; *Pleader*, 2 (D), 6; *Abatement* (F), 10; *J.* 727.
Swallow v. Emberson, 1 Lev. 161.

(*m*) *Frescobaldi v. Kinaston*, 2 Str. 784.

(*n*) *Read's case*, 5 Co. 33 b.

(*o*) *Beavan v. Ld. Hastings*, 2 Kay & J. 727.

(*p*) *Padget v. Priest*, 2 T. R. 97.

(*q*) Com. Dig. *Administrator* (C), 3; 1 W. Saund. 264 c, n. (2).

standing their renunciation, forthwith take upon themselves the execution of the will; (*f*) but if they all still refuse, then administration *de bonis non*, with the will annexed, must be obtained. The renunciation of one executor in the lifetime of another is a nullity; but it is otherwise if it is made after he has become the sole surviving executor. (*g*)

[* 1301] * **Administration De Bonis Non.** — On the death of an administrator, or of a sole or surviving executor after probate intestate, no interest or right of representation is transmitted to his administrator; but administration *de bonis non* must be taken out. (*h*) By the grant of such administration, the administrator *de bonis non* becomes the only personal representative of the original deceased, and is clothed with all the legal rights which belonged to the former executor or administrator in his representative character. (*i*) It was held, however, in an old case that, where an administrator received part of a debt, being rent in arrear due to the intestate, and took a promissory note payable to himself personally for the residue, this was such an alteration of the property as vested it in the administrator himself, and therefore that, on his death, his own personal representative, and not the administrator *de bonis non*, was entitled to the note. (*k*) Consistently with more recent decisions, however, it could now hardly be held that the taking of such a note by a man in his character of administrator, as a further security for a debt due to the estate of the intestate, would be an absolute conversion of the debt to his own use, so as to render him liable for a *devastavit*; and if not, the note so received would still be assets in his hands, he might sue in his representative capacity upon it, and it would consequently go to the administrator *de bonis non*, as the personal representative of the original intestate, and not to his own executor or administrator. (*l*) If, however, the administrator should take a bond or other obligation under seal,

(*f*) *House v. Lord Petre*, 1 Salk. 311.

(*g*) *Arnold v. Blencowe*, 1 Cox, 226.

(*h*) *Tingrey v. Brown*, 1 B & P. 310; *Elliott v. Kemp*, 7 M. & W. 311; *Moseley v. Rendell*, L. R. 6 Q. B. 338; 40 L. J. Q. B. 111.

(*i*) *Hirst v. Smith*, 7 T. R. 182; *Suwerkrop v. Day*, 8 Ad. & E. 624.

(*k*) *Barker v. Talcot*, 1 Vern. 474.

(*l*) *Catherwood v. Chaband*, 1 B. & C. 150.

payable to himself personally, this would be an absolute conversion to his own use of the property, and his own personal representative, and not the administrator *de bonis non*, would be entitled to the legal interest in the new security. (m) Where an administrator, being possessed of a term for ninety-nine years in his representative capacity, made an under-lease, reserving rent to himself individually, which the under-lessee covenanted to pay to him, his executors, &c., it was held that the executor of the administrator, and not the administrator *de bonis non*, was the proper party to maintain an action upon the covenant. (n) When administration has been granted to two persons, and one dies, the survivor will be sole administrator; (o) and as the administrator has no interest or right of representation but what he derives from the act * of the ordinary, [* 1302] he can in no case continue the trust reposed in him to his own executor.

Survivorship of Liability. — On the death of one of several executors or administrators, the survivors become liable upon all contracts made by the testator or intestate in his lifetime; and on the death of the surviving executor, the personal representative of each survivor. (p) If the surviving executor dies intestate, the administrator *de bonis non* of the original testator is the party liable; and so he is also on the death of the administrator of the original testator.

Appointment of a Debtor as Executor. — It was a doctrine of the common law that, if a creditor made his debtor his executor, the right of action for the debt was discharged; but this was really only an objection to the form of the action; for the debt was assets, and the executor was answerable for the amount; (q) and in equity he was regarded as a trustee of the debt for the parties interested in the estate. (r)

(m) *Norden v. Levit*, 189.

(n) *Drew v. Bayly*, 3 Keb. 298, 427, 795, 548; 2 Lev. 100.

(o) *Adams v. Buckland*, 2 Vern. 514.

(p) *Com. Dig. Abatement* (F), 10.

(q) *Wankford v. Wankford*, 1 Salk. 306; *Brown v. Selwyn*, Cas. temp. Talbot, 241; 3 Bro. P. C. 607; *Rawlinson*

v. Shaw, 3 T. R. 559; *Flud v. Rumcey*, Yelv. 160; 1 Rolle's Abr. 920, pl. 12, 13; *Phillips v. Phillips*, 2 Freem. 11; 1 Ch. C. 292; *Simmons v. Gutteridge*, 13 Ves. 262; *Carey v. Goodinge*, 3 Bro. Ch. C. 110.

(r) *Spence's Eq. Jur.* vol. 2, p. 296.

Appointment of a Debtor as Administrator. — If a person dies intestate, and administration is granted to a debtor of the deceased, the debt is not thereby extinguished; for he comes into the administration by the act of the law, whereas the other is the act of the party. (s) He is, moreover, clothed with a mere authority, and his interest is less than that of an executor. Therefore if the obligor of a bond takes out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action against the executor of the obligor for the recovery of the debt. (t)

Appointment of a Creditor as Executor. — If a debtor makes his creditor his executor, the action for the debt is not released, unless the latter thinks fit to act, and to take upon himself the burthen of the administration of the estate; (u) and if he does act, the right of action for his debt is not discharged unless he has legal assets in his hand sufficient to satisfy the debt, in which case he may pay himself out of such assets, (x) without reference to the statute of limitations. (y) If one of two joint and several debtors makes their common creditor his executor and dies, and the executor has no assets of the deceased [* 1303] wherewith to satisfy * the debt due to him, he may sue the surviving debtor; but not if he has assets out of which he may retain the debt; for the having assets amounts to payment. (z) So if the debtor appoints his creditor to be one of several executors, and there are no assets, or the creditor executor neither proves the will nor acts, he is not prevented from suing his co-executor; (a) and if he dies, his executor can maintain an action for the debt against the surviving executor. A creditor executor is in all cases entitled to retain the amount of his debt out of the assets that come to his hands to be administered, (b)

(s) Bac. Abr. *Executors* (A), 10.

(t) *Hudson v. Hudson*, 1 Ark. 461; *Lockier v. Smith*, 1 Sid. 79; 1 Keb. 313, pl. 33.

(u) *Rawlinson v. Shaw*, 3 T. R. 559.

(x) *Lowe v. Peskett*, 16 C. B. 511; 24 L. J. C. P. 196; *Powys, J., Wankford v. Wankford*, 1 Salk. 304; *Holt*,

C. J., ib. 305; *Ashby v. Child*, 1 Rolle, Abr. 940.

(y) *Hill v. Walker*, 32 Law T. R. 71.

(z) *Cock v. Cross*, 2 Lev. 73; *Anon.*, 1 Freem. 49.

(a) *Dorchester v. Webb*, W. Jones, 345.

(b) *In re Morris's Estate*, L. R. 10 Ch. 68.

also a debt due from the testator to the wife of such executor before her marriage. (c)

Civil Death. — Where a person has been outlawed, he is civilly dead, and is incapable of enforcing any contract he may have entered into, (d) although he is liable to be sued thereon. (e) If he is outlawed for a capital offence, he forfeits all his lands and tenements; and in all cases, after outlawry, he forfeits his goods and chattels, debts and choses in action. All his bonds, bills, notes, and covenants, and securities for the payment of money, vest in the crown; and the king or his grantee may maintain an action upon them in his own name. (f) The forfeiture extends also to all property in which he is beneficially interested, and to all equitable as well as legal rights. Therefore a bond taken in another's name, or a lease granted to another in trust for him, becomes forfeited to the crown. (g) The removal of the disability by reversal of the outlawry does not enable the party thus restored to his civil rights to sue upon any of the bonds, covenants, or personal contracts which have been forfeited and have become vested in the crown. But inasmuch as his freehold land is not divested out of him and transferred to the crown until office found, (h) he has a right to sue the lessees and tenants of such property upon covenants for the payment of rent, covenants to repair, and other real contracts connected with such estates, unless the crown interferes to prevent him. He may also grant leases thereof, and deal generally with the property subject to the paramount title of the crown. (i)

The outlaw may, however, sue in *autre droit*, as, for instance, * in his character of executor; and a mayor [* 1304] and commonalty may sue, although the mayor himself has been outlawed. (k)

Pelona. — The law was formerly the same with respect to

(c) *Woodward v. Lord D'Arcy*, 276; *Roberts v. Walker*, 1 Russ. & M. Plowd. 185 a; *Boyd v. Brooks*, 34 Beav. 753.
7; 34 L. J. Ch. 605.

(d) *Hawk. P. C. lib. 2, c. 49, sect. 9.* Earl of Somerset's case, Hob. 214.

(e) *Macdonald v. Ramsey, Foster*, 61; Sid. 60; Cro. Jac. 426.

(g) *Hawk. P. C. lib. 2, c. 49, sect. 10;*

(h) *Doe v. Evans*, 5 B. & C. 587.

(i) *Doe v. Pritchard*, 5 B. & Ad. 765;

(f) *Com. Dig. Forfeiture (B), 2;* *Clerke v. Scroggs*, 2 Lutw. 1513.

Slade's case, 4 Co. 95 a; *Ford's case*, 12 Co. 2; *Bullock v. Dodds*, 2 B. & Ald.

(k) *Co. Litt. 128 a.*

felons; but a considerable change has been effected by the 33 & 34 Vict. c. 23, by which forfeiture or escheat for felony, with its consequences, is abolished. But the choses in action to which a convict, that is a person against whom, after the passing of that act, judgment of death or of penal servitude has been pronounced, was, at the time of his conviction, or may thereafter, until he has suffered his punishment or received a pardon, become entitled, pass to the administrator or *interim curator* appointed under that act, who may cause payment or satisfaction to be made out of the convict's property of any debt or liability of the convict. (*l*)

Survivorship of Joint Contractors. — At common law, when several persons took a joint interest in, and had a joint right of action upon, a contract, and one of them died, the action must have been brought in the name of the survivors; and the personal representative of the deceased could not be joined; (*m*) nor could he sue separately. (*n*) If a bond was made to three persons to pay a sum of money to one of them, who afterward died, the two survivors were the only parties who could maintain an action upon the instrument, although they had no interest in the sum mentioned in the condition. (*o*) If a sum of money was invested in the funds in the joint names of two persons, the survivor took the whole at law, although he might be accountable in equity as a trustee of the money. (*p*) If two persons advanced a sum of money by way of mortgage, and took the mortgage to them jointly, and one died, the whole interest and right of action at law went to the survivor; but in equity, the representative of him who was dead had his proportion. (*q*) It followed, therefore, that if all the parties jointly interested in a contract died, the right of action vested in the personal representative of the one who survived the others, and that the executors or administrators of those who died previously could not be joined. And although for the furtherance of trade and com-

(*l*) 33 & 34 Vict. c. 23, sects. 14, 24.

(*m*) *Bellingham v. Clark*, 1 B. & S. 332.

(*n*) *Anderson v. Martindale*, 1 East, 497; *Bradburne v. Botfield*, 14 M. & W. 571.

(*o*) *Rolls v. Yate*, Yelv. 177.

(*p*) *Crossfield v. Such*, 8 Exch. 825; 22 L. J. Ex. 325.

(*q*) *Petty v. Styward*, 1 Ch. Rep. 31.

merce, the doctrine of survivorship was excluded among merchants, so as to permit the interest in joint contracts of a commercial character to pass, in case of death, to the personal representative, and to enable him to maintain an action of account against the survivors for the share of the deceased, yet the remedy by way of action upon the contract always survived. Thus if two partners * in trade appointed a [* 1305] factor, and one died, the personal representative of the deceased could not join in an action against the factor upon the partnership account. (r) When, on the other hand, the parties to a contract took several and distinct interests, the action was properly brought in the name of the personal representatives of the deceased.

In the case of joint contracts, the estate of a deceased partner was made liable in equity to the creditors of the firm, although the liability at common law survived to the surviving partners; and the personal representative of a deceased joint contractor will, therefore, now be liable to the extent of the assets that have come to his hands. If several persons jointly contract for the building of a ship, or the furnishing a house, for the common benefit of all, for a certain sum, and it is expressly agreed that, if any of the parties should die before the completion of the work, his executors should stand in his place, there, though the legal remedy of the party employed would have been solely against the survivors, yet the law would certainly imply a contract on the part of the deceased that his executors should pay their proportion of the contract price. (s)

(r) *Martin v. Crompe*, 1 *Ld. Raym.*
340.

(s) *Prior v. Hembrow*, 8 *M. & W.*
889.

SECTION III.

TRANSFER BY MARRIAGE.¹

Rights of the Husband upon the Wife's Contracts before Marriage at Common Law.—At common law, the husband by the marriage acquires a qualified property in the wife's choses in action; but it is a qualified property only; for until he has

¹ Upon the general subject of the transfer of rights in action belonging to a woman, or of her liabilities to her husband by virtue of her marriage, see the works cited *ante*, Vol. I. p. *133, American note. In more than half the States, modern statutes have given to married women the entire control of personalty, including choses in action owned by them at the time of marriage. In a few instances it is expressly provided that such choses in action and rights by contract shall be free from the control and disposal of the husband. Ga. Code, sect. 1754; Minn. Rev. Stat. c. 69, sect. 1; Mo. Rev. Stat. sect. 3296. Oftener the statutes declare in effect that the wife's property, real and personal, owned at the time of marriage is her sole and separate estate, or is not liable for the debts of her husband. Consult Ark. Const. 1874, art. 9, sects. 7, 8; Cal. Code, sect. 162; Col. Rev. Stat. sect. 1747; Conn. Act Mar. 27, 1878; Del. Acts. 1875, p. 289, sect. 1; Ill. Rev. Stat. c. 68, sect. 9; Ind. Rev. Stat. sects. 5116, 5117; Iowa Code, sect. 2202; Kan. Act Mar. 31, 1868, sect. 1; Me. Rev. Stat. p. 397; Md. Code, art. 51, sect. 19; Mass. Pub. Stat. c. 147, sect. 1; Mich. Comp. L. sect. 4803; Miss. Code, sects. 1778, 1779; Neb. Comp. Stat. c. 53, sect. 1; Nev. Comp. L. sects. 151, 159; N. H. Gen. L. c. 183, sect. 1; N. J. Rev. Stat. p. 637; N. Y. Rev. Stat. (1882), vol. 3, p. 2336; N. C. Const. (1868), art. 10, sect. 6; Ohio Rev. Stat. sect. 3109; Oregon Const. art. 15, sect. 5; Va. Acts, 1876-77, p. 333; W. Va. Kelly Stat. c. 122, sect. 2; Wis. Rev. Stat. sect. 2341.

In nearly all the States, legislation has modified, and in many has entirely abrogated, the husband's common law liability for his wife's ante-nuptial debts. See Ala. Code, sect. 2704; Ark. Act, Apr. 28, 1873; Conn., see Kelly, *Contr. M. W.* 338; Fla. Rev. Stat. c. 150, sect. 7; Ill. Rev. Stat. c. 68, sect. 5; Iowa Code, sect. 2212; Me. Rev. Stat. p. 398; Mass. Pub. Stat. c. 147, sects. 8, 9, 10; Mich. Comp. L. sect. 4806; Minn. Rev. Stat. c. 69, sect. 3; Miss. Code, sect. 1780; Neb. Comp. Stat. c. 53, sect. 7; Nev. Comp. L. sect. 166; N. H. Gen. L. c. 183, sect. 18; N. J. Rev. Stat. p. 638; N. C., Battle's Revision, c. 69, sect. 13; Pa., Brightly's *Purdon's Dig.* p. 1006; S. C. Rev. Stat. c. 100, sect. 3; Tenn. Acts, 1877, p. 104; Wis. Rev. Stats. sect. 2346.

In the following States at least, statute expressly provides that the husband shall be liable to the extent of any of his wife's property which may come into his hands by ante-nuptial agreement or otherwise. Col. Rev. Stat. sect. 1754; Ga. Code, sect. 1753; Ind. Rev. Stat. sect. 5125; Ky. Gen. Stat. c. 52, art. 2, sect. 4; W. Va. Kelly, Stat. c. 122, sects. 10, 11. In Ohio, the common law seems still to control. *Alexander v. Morgan*, 31 Ohio St. 546.

reduced them into his possession, they remain the property of the wife; and if the husband omits to reduce them into his possession in his lifetime, they survive to the wife, who is alone entitled to the benefit of them. (a) The husband and wife have, therefore, a joint interest in them.

But as the husband has the power of immediately enforcing a claim of the wife, forbearance by him from so doing is a sufficient consideration to support a promise made to him alone; (b) *and upon such a promise the husband [*1306] alone must sue, as the wife is no party nor privy to it. (c)

If the husband has commenced a joint action in his own name and in that of his wife, for the purpose of reducing the wife's chose in action into possession, and the wife dies before judgment, the husband's right is gone, and the unrecovered chose in action vests in the personal representative of the wife; but if the wife dies after judgment, but before execution, the husband alone is entitled to the benefit of the judgment, and may have execution thereon. (d) If the husband receives money which was owing to the wife, or if he, or he and his wife, authorize a person to receive it, who actually obtains it, either of such modes of receipt will change the wife's interest in the property, and will be a reduction of the chose in action into the possession of the husband, divested of her title to it upon surviving him; (e) but when money owing to the wife is received by a person as agent for the husband and wife to carry into effect certain specified objects, he cannot, against the will of the parties, treat this as a reduction into possession by the husband on his own account and for his own purposes. (f)

The husband is alone entitled during the coverture to the benefit of covenants running with the wife's land, and may sue alone even after the wife's death for all breaches not in the nature

(a) *Milner v. Milnes*, 3 T. R. 631; 9 D. & R. 243; *Gabriel Miles's case*, 1 Sherrington v. Yates, 12 M. & W. 865. Mod. 179.

(b) *Rumsey v. George*, 1 M. & S. 180.

(c) *Lea v. Minnie*, Yelv. 84.

(d) *Checchi v. Powell*, 6 B. & C. 253;

(e) 1 Rolle, Abr. (D) 350; Co Litt. 351 a; *Temple v. Temple*, Cro. Eliz. 791.

(f) *Jones v. Cuthbertson*, L. R. 7 Q. B. 218.

of continuing breaches, where the ultimate damage has accrued during the coverture, or he may sue jointly with the wife in her lifetime. (*g*) Where, however, the breach of a covenant running with the land is a continuous one, and may continue after the death of the husband, as in the case of breaches of covenant for title and further assurance of the wife's lands, the wife will be entitled to such damages as may result from the continuing breach of the contract after the coverture is at an end, and therefore both should join in suing. (*h*) The husband is also entitled to the benefit of all bills of exchange and promissory notes payable to the wife not indorsed by her before marriage. (*i*) In the exercise of his marital rights, also, he may at once indorse them, the wife's power of indorsement [* 1307] over them * being superseded by the marriage, and vested in the husband. (*k*) If the husband does not reduce choses in action of this nature into his possession in his lifetime, they survive to the wife. The receipt by the husband of interest on a promissory note made to the wife before the marriage, is no evidence of a reduction of the note into the possession of the husband during the coverture. (*l*)

Rights of the Husband upon the Wife's Contracts by Statute. — The Married Women's Property Act, 1870, (*m*) has very much modified the common law right of the husband to his wife's property, and in a less degree, his right to her choses in action. By sect. 2 of that act, deposits in savings banks made by, and annuities granted by the Commissioners for the Reduction of the National Debt to, women who afterward marry, remain the separate property of such women, and are to be accounted for and paid to them as if they were unmarried women. And a woman married after the passing of that act will be solely entitled to the benefit of covenants running with any freehold,

(*g*) *Aleberry v Walby*, 1 Str. 229; *Dunstan v. Burwell*, 1 Wils. 224; Bro. Abr. *Covenant*, p. 110; *Brett v. Cumberland*, 3 Bulst. 163; Cro. Jac. 399; *Nurse v. Wills*, 4 B. & Ad. 739.

(*h*) *Middlemore v. Goodale*, 1 Roll. Abr. 348.

(*i*) *M'Neillage v. Holloway*, 1 B. & Ald. 221. The observation of Lord El-

lenborough in that case, "that a promissory note may be treated as a personal chattel in possession," is incorrect. See *per Parke, B.*, *Yates v. Madeley*, 6 M. & W. 427.

(*k*) *Mason v. Morgan*, 2 Ad. & E. 30; *Connor v. Martin*, cited 3 Wils. 5.

(*l*) *Hart v. Stephens*, 6 Q. B. 937.

(*m*) 33 & 34 Vict. c. 93.

copyhold, or customary land which may descend to her as heiress of an intestate (*n*)

Liability of the Husband upon the Wife's Contracts made before Coverture. — At common law, if a *feme sole* executes a bond, or makes a promissory note, or accepts a bill of exchange, and then marries, the husband and wife are jointly liable; (*o*) and if judgment is recovered against them both in the wife's lifetime, execution may be issued against the husband, who may thus be compelled to fulfil his wife's contract made before marriage, or to discharge and satisfy the wife's debt. (*p*) But if these debts are not recovered against the husband and wife in the lifetime of the wife, the husband cannot be charged with them. And if the wife dies during the pendency of the action, and before a joint judgment has been obtained against them both, the husband is discharged; (*q*) but if she dies after judgment, the husband remains liable. If no action is brought during the coverture, and the wife survives, she remains as liable for the debt as she was before the marriage; (*r*) but if an action was brought and judgment recovered against husband and wife during the coverture, and if the husband became bankrupt, and *obtained his discharge, the liability of both [* 1308] was gone at law, (*s*) although her property settled to her separate use at the time of the marriage remained liable in equity. (*t*)

This liability of the husband was affected by the Married Women's Property Act, 1870, which provided (sect. 12) that a husband should not, by reason of any marriage that might take place after the coming into operation of the act, (*u*) be liable for the debts of his wife contracted before marriage; but she

(*n*) Sect. 8; see *In re Voss*, 13 Ch. D. 504.

(*o*) *Drue v. Thorne*, Aleyn, 72; *Mitchenson v. Hewson*, 7 T. R. 348; *Hayward v. Williams*, Sty. 280; *Haydon v. Miller*, 2 Rolle, 53; *Milner v. Milnes*, 3 T. R. 631.

(*p*) *Eyres v. Coward*, 1 Sid. 337; *O'Brian v. Ram*, 3 Mod. 186; Bar. Abr. *Baron and Feme* (F).

(*q*) 1 Rolle, Abr. 351 (G), pl. 2; *Heard v. Stamford*, 3 P. Wms. 411.

(*r*) *Woodman v. Chapman*, 1 Campb. 188.

(*s*) *Lockwood v. Salter*, 5 B. & Ad. 303; *Miles v. Williams*, 1 P. Wms. 249, 257.

(*t*) *Chubb v. Stretch*, L. R. 9 Eq. 555; *London & Prov. Bank v. Bogle*, 7 Ch. D. 773.

(*u*) Aug. 9, 1870.

was liable to be sued for, and any property belonging to her for her separate use was liable to satisfy, such debts as if she had continued unmarried. A judgment was entered against a wife but in favor of a husband, and an action was then commenced for the purpose of enforcing the judgment against the wife and for recovery from her estate of the costs payable to the husband. The wife's property had been settled on her marriage to her separate use without power of anticipation, but it was held that the plaintiffs might recover against her estate the whole of their claim. (x)

"By the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), sect. 1, however, so much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage, is repealed so far as respects marriages which shall take place after the passing of the later act, and a husband and wife married after the passing of the later act may be jointly sued for any such debt.

"By sect. 2, the husband shall in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; (y) and in addition to any other plea or pleas, may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded, the husband shall be deemed to have confessed his liability so far as assets are concerned.

"By sect. 3, if it is not found in such action that the [* 1309] husband is * liable in respect of any such assets, he

(x) *London & Prov. Bank v. Bogle*, 7 Ch. D. 773; see also *Sanger v. Sanger*, L. R. 11 Eq. 470; *Chubb v. Stretch*, L. R. 9 Eq. 555. Execution may issue against her as if she were a *feme sole*, and her husband need not be joined in

the action. *Williams v. Mercier*, 9 Q. B. D. 337.

(y) This was held to apply to a husband of a wife married in England, but who had contracted debts in Jersey. *De Greuchy v. Wills*, 4 C. P. D. 362.

shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

“ By sect. 4, when a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife; and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

“ By sect. 5, the assets in respect of, and to the extent of, which the husband shall in any such action be liable, are as follows:—

- (1) “ The value of the personal estate in possession of the wife which shall have vested in the husband.
- (2) “ The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession.
- (3) “ The value of the chattels real of the wife which shall have vested in the husband and wife.
- (4) “ The value of rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received.
- (5) “ The value of the husband’s estate or interest in any property real or personal which the wife in contemplation of her marriage with him shall have transferred to him or to any other person.
- (6) “ The value of any property real or personal which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors.

“ Provided that, when the husband after marriage pays any debt of his wife, or has a judgment *bona fide* recovered against him in any such action as is in this act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action (z) be liable.”

(z) This means any action commenced subsequently to the commencement of the former action. *Fear v. Castle*, 8 Q. B. D. 380.

Liabilities of the Surviving Wife.— All debts contracted by the wife prior to the marriage which have not been barred by the statutes of limitations, survive against her on the death of her husband; and she may then be charged with the payment of them. (*a*)

[* 1310]

* SECTION IV.

TRANSFER BY BANKRUPTCY.¹

Effect of an Adjudication in Bankruptcy.— Immediately upon the adjudication, the choses in action and obligations of the bankrupt vest in the registrar, and upon the appointment of a trustee they forthwith pass to and vest in the trustee; (*a*) and they are to be deemed to have been duly assigned to the trustee for the purpose of his instituting an action for their recovery. (*b*)

Under the former acts, it was held that the usual covenant in a lease, not to underlet or assign, would not prevent the transfer of the lease to the assignees if they thought fit to claim it. (*c*) Trustees in bankruptcy possess the same remedies for the recovery of the bankrupt's debts and choses in action, and for the recovery of unliquidated damages for breaches of contract, in which the bankrupt is beneficially interested, as the bankrupt himself would have had, had he not become bankrupt. (*d*) His rights are their rights; and the damages due to him, in respect of his personal estate, are due to them. (*e*) So where a person was adjudicated bankrupt in 1878, and sued for damages for

¹ Upon the general question what rights in action pass to an assignee in bankruptcy by an assignment made under the Act of 1877, and amendatory laws, see U. S. Rev. Stat. tit. 61, *Bankruptcy*, c. 4; also the works mentioned *ante*, p. * 1243.

(*a*) *Woodman v. Chapman*, 1 Campb. 188.

(*a*) 32 & 33 Vict. c. 71, sect. 17.

(*b*) Sect. 22.

(*c*) *Doe v. Beavan*, 3 M. & S. 353; *Doe v. Carter*, 8 T. R. 57, 300; *Doe v. Smith*, 5 Taunt. 795.

(*d*) *Wright v. Fairfield*, 2 B. & Ad. 727.

(*e*) *Hill v. Smith*, 12 M. & W. 630; *Beckham v. Drake*, 2 H. L. C. 616; *Wetherell v. Julius*, 10 C. B. 280; *Stanton v. Collier*, 3 El. & Bl. 274; *Ashdown v. Ingomells*, 5 Ex. D. 280, C. A.

wrongful dismissal in 1880 from an employment under a contract made before bankruptcy, and for money earned under such contract, it was held that both causes of action passed to the trustee. (*f*) The trustees represent the creditors for all purposes, as well as the bankrupt himself; and if any fraud exist in a transaction to which the bankrupt was a party, they may take advantage of it for the benefit of the creditors, (*g*) and may consequently make claims which the bankrupt himself would be estopped from doing. (*h*) They may recover money received by agents of the bankrupt, and paid over to the latter after the act of bankruptcy; they may also recover the money from a creditor, who has received payment of his debt after an act of bankruptcy by way of fraudulent preference, or has enforced payment in a foreign country of a debt due to him from the bankrupt, having, at the time, notice of the bankruptcy. (*i*) Whenever a third * party has received money of the bank- [* 1311] rupt under circumstances which create a right to recover it back, the trustees may sue for and recover it. (*k*)

Executory Contracts. — Among the beneficial rights and interests which pass to the trustees by virtue of their appointment, are executory contracts in which the bankrupt is interested, and from which benefit may accrue to the estate, and which can be performed on the part of the bankrupt by the trustees themselves. The bankruptcy has no other effect on these contracts than to put the trustees in the place of the bankrupt, neither rescinding the obligations of either party, nor imposing new ones. (*l*) The trustees consequently may sue upon all executory contracts of sale entered into with the bankrupt, either for the non-delivery of goods and chattels, stock or shares, purchased by the bankrupt, or for the non-acceptance of property sold by him. (*m*) And the bankrupt cannot, by stipulations inserted in a contract made by him with third parties, restrict the legal

(*f*) *Emden v. Carte*, 17 Ch. D. 768,
C. A.

(*g*) *Doe v. Ball*, 11 M. & W. 533.

(*h*) *Russell v. Bell*, 10 M. & W. 352.

(*i*) *Hunter v. Potts*, 4 T. R. 182;
Sill v. Worswick, 1 H. Bl. 665; *Phillips*
v. Hunter, 2 ib. 402.

(*k*) *Brandon v. Pate*, 2 H. Bl. 308;
Holmes v. Walsh, 7 T. R. 458.

(*l*) *Gibson v. Carruthers*, 8 M. & W.
333.

(*m*) *Boorman v. Nash*, 9 B. & C. 152.

rights of the trustees, or deprive them of property, or of the benefit of a contract, to which they would otherwise be entitled. (*n*) All that the trustees are bound to do is to fulfil the bankrupt's part of the engagement when the proper time arrives. If they expressly waive the contract, or without any express waiver, if at the proper time they omit to do what by the terms of the contract they are bound to do, in the first case they certainly will, and in the second they probably may, absolve the other party from all obligation towards them. (*o*) Some executory contracts, founded upon the personal skill and talent of the bankrupt, or upon a mutuality of obligation and liability, are discharged by the bankruptcy when nothing has been done under them; (*p*) but if the bankrupt does execute the contract, the trustees may sue upon it on the completion of the work. (*q*)

Equitable Interests not vesting in the Trustees.— If by the assignment of a debt or other chose in action, the bankrupt has given to the assignee of such debt an equitable claim thereto, no right of action passes to the trustees, (*r*) as the money when recovered, is not distributable among the creditors. But if the bankrupt possesses a legal interest and estate, with a possibility of a beneficial interest from which a benefit to his creditors may result, such legal interest and possibility of benefit will

[* 1312] pass to the * assignees, if they think fit to claim it. (*s*)

And in the case of the assignment of a trade debt, if the debtor has received no notice of the assignment, the debt will remain in the order and disposition of the bankrupt, and will pass to the trustees. (*t*)

An assignment of a debenture which is a chose in action within the meaning of sect. 15, sub-sect. 5 of the Bankruptcy Act, 1869, confers a good title on the assignee, notwithstanding he gave no notice to the company until after the bankruptcy. (*u*)

(*n*) *Tripp v. Armitage*, 4 M. & W. 699.

(*o*) *Gibson v. Carruthers*, 8 M. & W. 329.

(*p*) *Beckham v. Drake*, 11 M. & W. 315; 2 H. L. Cas. 579; *Knight v. Burgess*, 33 L. J. Ch. 727.

(*q*) *Whitmore v. Gilmour*, 12 M. & W. 808.

(*r*) *Tibbits v. George*, 5 Ad. & E. 113.

(*s*) *Carvalho v. Burn*, 4 B. & Ad. 393; 1 Ad. & E. 883; *Doe v. Steward*, ib. 300.

(*t*) Bankruptcy Act of 1869, sect. 15 (5); *Buck v. Lee*, 1 Ad. & E. 804.

(*u*) *In re Pryce*, 4 Ch. D. 685.

The words debts due "in the course of his trade," include only debts connected with his trade. (x)

If a bill of exchange has been indorsed merely for the accommodation of the bankrupt, then, as the latter has no right of action upon the bill against the acceptor, no right of action can pass to the trustees; and as the bill, in their hands, could not be made available for the benefit of the creditors, it does not pass to them, but remains with the bankrupt, who in several instances has indorsed the bill after his bankruptcy, so as to give to the *bona fide* indorsee a right of action thereon against the accommodation acceptor. (y) And it has been held that if a bill has been delivered by the bankrupt for a valuable consideration to another, so as to transfer to him the beneficial interest therein, the bankrupt may, after his bankruptcy, indorse the bill, and thus complete the legal title; (z) and he may, of course, indorse all bills and notes which he holds with authority to indorse as agent or trustee for another. (a) But all bills of exchange and promissory notes, holden *bona fide* by the bankrupt or insolvent for a valuable consideration, and in which he is beneficially interested, vest in the trustees, and may be put in suit by them in their own names. (b) Where there are two separate causes of action totally distinct from each other, although arising upon one and the same instrument, and the bankrupt has no beneficial interest in one, the cause of action in which he has a beneficial interest will pass to the trustees, while the other will not. (c)

Money in the Hands of a Bankrupt clothed with a Specific Trust, does not pass to the trustees. If, therefore, money has been advanced to a bankrupt to be applied to a special purpose, and to be returned if the purpose cannot be accomplished, that money does not vest in the trustees, if it has been kept separate * and apart from the moneys of the bankrupt, [* 1313] and has not been used by him so as to make him a borrower of the money for his own use. (d)

(x) *Ib.*(y) *Wallace v. Hardacre*, 1 Campb. 333.
46; *Willis v. Freeman*, 12 East, 660.(z) *Watkins v. Maule*, 2 Jac. & Walk. 243; *Ex parte Greening*, 13 Ves. 206.(a) *Gibson v. Carruthers*, 8 M. & W.(b) *Willis v. Freeman*, 12 East, 656.(c) *Boddington v. Castelli*, 23 L. J. Q. B. 33.(d) *Toovey v. Milne*, 2 B. & Ald.

Sale of the Bankrupt's Book-Debts, Goodwill, &c. — By sect. 25, sub-sect. 6, of the Bankruptcy Act of 1869, the trustees are authorized to sell the book-debts of the bankrupt and the goodwill of his business; and the purchaser has, by virtue of the assignment, power to sue in his own name for the debts assigned to him. (*e*) This section does not authorize the sale of the books of a bankrupt solicitor. (*f*) The book-debts referred to in the section are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade books. (*g*)

A sale to the bankrupt himself is authorized by the act, and in that case the bankrupt may sue in his own name. (*h*)

Transfer to the Trustees of Contracts in which the Bankrupt is interested in Right of his Wife. — The bankrupt's disposable interest in his wife's property, not settled upon the wife for her separate use, passes, together with the property which the bankrupt or insolvent possesses in his own right, to the trustees, who thus become entitled to the rents and profits of all the real estates of which the husband is seised in right of his wife, and which have not been vested in trustees for her sole and exclusive use, and to the benefit of all covenants annexed to such estates, and all contracts relating to the same. (*i*) The trustees will take the rights of the husband over the choses in action of the wife in the same plight and condition as the husband himself had them, (*k*) and must bring a joint action in their own names and in that of the wife for the purpose of reducing her chose in action in possession, and must recover judgment and take out execution in such joint action before the death of the husband, to make good their title against the wife, in case she should survive him. (*l*) The trustees cannot sue alone on a promissory note, not negotiable, given to the wife before marriage; (*m*) and if the wife before

683; *Edwards v. Glyn*, 28 L. J. Q. B. 359.

(*e*) Sect. 111.

(*f*) *Ex parte Roberts, in re Holder*, 33 L. J. Bk. 8.

(*g*) *Shipley v. Marshall*, 14 C. B. n. s. 566; 32 L. J. C. P. 258.

(*h*) *Kitson v. Hardwick*, L. R. 7 C. P. 473. By sub-sect. 2, the trustee is empowered to carry on the business so far

as necessary for winding up only. See *Ex parte Emmanuel*, 17 Ch. D. 35.

(*i*) *Doe v. Steward*, 1 Ad. & E. 311.

(*k*) *Ex parte Coysegame*, 1 Atk. 192.

(*l*) *Mitford v. Mitford*, 9 Ves. 99;

Pierce v. Thornley, 2 Sim. 177; *Purdew v. Jackson*, 1 Russ. 26; *Honner v. Morton*, 3 Russ. 68.

(*m*) *Sherrington v. Yates*, 12 M. & W. 864.

her marriage has assigned to a trustee a chose in action for the benefit of herself, the right to sue on that chose in action cannot pass to the trustees of the bankrupt husband. (*n*)

Transfer to the Trustees of the Bankrupt's Interest in a * Partnership.—If one of several partners is adjudged [* 1314] bankrupt, his interest in the partnership contracts and transactions entered into before the bankruptcy passes to the trustees. (*o*) Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee, with consent of the creditors, certified by a special resolution, to commence and prosecute any action or suit in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action or suit relates will be void. But notice of the application for authority to commence the action or suit must be given to such partner, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action or suit, and if he does not claim any benefit therefrom, he is to be indemnified against costs in respect thereof, as the court directs. (*p*) The trustees of a firm in partnership being trustees of the entire estate of each partner, as well as trustees of the property of the whole firm, may in the same action recover debts due to all the partners jointly, and the separate debts due to each partner individually; for the money, when recovered, all goes to the same fund, to be divided among the creditors. (*q*)

Contracts made with the Bankrupt during the Bankruptcy.—The trustees also are entitled to sue, if they think fit, upon all contracts entered into with the bankrupt during the bankruptcy, not being contracts for the personal labor and services of the bankrupt made for the earning of his necessary subsistence. If the bankrupt or his servants have sold goods, after the bankruptcy, to parties who bought with notice of the bankruptcy, the trustees may treat the bankrupt as their agent, and sue such purchasers for the price, or they may treat the purchasers as wrong-doers, and bring an action for the goods. An application

(*n*) *Parnham v. Hurst*, 8 M. & W. 750.

(*o*) *Eckhardt v. Wilson*, 8 T. R. 142.

(*p*) Bankruptcy Act, 1869, sect. 105.

(*q*) *Graham v. Mulcaster*, 12 Sc. 327.

by the trustees to the purchasers for payment of the price, treating the transaction as a contract for sale, amounts only to a conditional adoption of the contract, and is dependent upon the demand of payment being acceded to. If payment is not made, the trustees may repudiate the sale altogether. (*r*) Upon a contract which has been entered into before the bankruptcy, but which has not been finally completed until after the bankruptcy, the trustees alone are entitled to sue. (*s*) And with regard to all contracts made by the bankrupt before he obtains his certificate,

the trustees may, if they please, adopt such contracts, [* 1315] treating * the bankrupt as their agent in the transaction.

They may enforce payment of a bill of exchange or negotiable security, made payable to the bankrupt after the bankruptcy. (*t*) They may claim the fruits of his trading, or of his carrying on business as a general medical practitioner, the proceeds of his inventions and discoveries, the profit of his patent-rights and money awarded to him as compensation for a breach of contract. (*u*) If the bankrupt has bestowed his work and labor and skill upon materials provided by the trustees, they are entitled to the benefit of such work and labor in common with the materials upon which it has been employed; and if he has entered into an executory contract for the sale of goods, the trustees may affirm this contract, and, treating the bankrupt as their agent in the matter, may bring an action for the price. (*x*) If, however, the trustees permit an undischarged bankrupt to pay away for value money which he has received since the adjudication, which they could have required to be paid to them, they cannot follow it, even though the person to whom the money was paid had notice of the bankruptcy. (*y*)

Rights of Undischarged Bankrupts. — The bankrupt has a right to maintain actions upon contracts entered into with him after

(*r*) *Valpy v. Sanders*, 17 L. J. C. P. 249. *Ex parte Ford*, 1 Ch. D. 521; *In re Dowling*, 5 Ch. D. 689; *Emden v. Carte*, 17 Ch. D. 169.

(*s*) *Hillary v. Morris*, 5 C. & P. 6.

(*t*) *Kitchen v. Bartsch*, 7 East, 53.

(*u*) *Crofton v. Poole*, 1 B. & Ad. 568; *Elliot v. Clayton*, 16 Q. B. 584; *Hesse v. Stevenson*, 3 B. & P. 578; *Wadling v. Oliphant*, 1 Q. B. D. 145; see also

(*x*) *Whitmore v. Gilmour*, 13 L. J. Ex. 201; 12 M. & W. 808; *Evans v. Mann*, 2 Cowp. 569.

(*y*) *Ex parte Dewhirst*, in re Van-lohe, L. R. 7 Ch. 185.

his bankruptcy, and before he has obtained his certificate, unless the trustees interfere to prevent him; he may sue for money lent, goods sold and delivered, and for work and labor done and materials provided by him after he has been adjudged bankrupt, inasmuch as such after-acquired property does not vest absolutely in the trustees, although they have a right to claim it; if they do not make any claim, the bankrupt has a perfect right as against all other persons, and may maintain actions accordingly. (z) When, therefore, after the bankruptcy, the defendant made a promissory note payable to the bankrupt or his order, and the latter indorsed the note without the previous consent of the trustees, it was held first, that as against the defendant, and as against all the world excepting the trustees, the bankrupt was competent to make the indorsement; and secondly, that as the defendant, notwithstanding the bankruptcy, had made the note payable to the order of the bankrupt, he could not afterward dispute the power of the latter to indorse it, and was therefore * estopped from setting up the bankruptcy as [* 1316] an answer to the action. (a) The bankrupt is entitled also to the earnings of his own personal labor, without which it has been said he would be left to starve; (b) and it has consequently been held that if the trustees themselves employ the bankrupt, and have the benefit of his personal labor under an agreement to pay him wages, he may maintain an action against them for the recovery thereof. (c) But he cannot acquire a right of property in anything beyond the produce of his daily labor reasonably necessary for his subsistence. If he works up materials, employs subordinate agents under him, or in any way amasses money, his proprietary rights in respect thereof may be at once annihilated by the intervention and claim of his trustees. The bankrupt may sue also, as we have already seen, upon all contracts in which he has a bare legal title as trustee. After the close of the bankruptcy proceedings, although there has been no order of discharge, property falling in to the bankrupt belongs

(z) *Webb v. Fox*, 7 T. R. 391; *Jameson v. Brick Co., Limited*, 4 Q. B. D. 208.

(a) *Drayton v. Dale*, 2 B. & C. 293.

(b) *Chippendale v. Tomlinson*, 4 Doug. 318.

(c) *Coles v. Barrow*, 4 Taunt. 754.

to him, and not to the trustee; (d) but a separate creditor may prove against the bankrupt, and avail himself of such property. (e)

Liability of an Undischarged Bankrupt. — With respect to the status of an undischarged bankrupt after the close of the bankruptcy, it is enacted by the Bankruptcy Act, 1869, sect. 54, that where a person who has been made bankrupt has not obtained his discharge, then from and after the close of his bankruptcy the following consequences shall ensue:—

1. No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property.

2. At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the mean time) shall be deemed to be a subsisting debt in the nature of a judgment debt, and subject to the rights of any persons who have become creditors of the debtor since the [* 1317] close of his * bankruptcy, may be enforced against any property of the debtor with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in the manner directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf.

Liability of the Trustees upon the Bankrupt's Covenants and Executory Contracts. — If the trustees elect to take the bankrupt's leases and interests in land, they become chargeable upon the covenants annexed to such estates and running with the

(d) *In re Pettit's Estate*, 1 Ch. D. 478.

(e) *In re Westby*, 10 Ch. D. 776.

land. So also the trustees may elect to take the bankrupt's executory contracts, and will then be chargeable therewith. (*f*)

Disclaimer by the Trustee. — When any property of the bankrupt, acquired by the trustee under the Bankruptcy Act, consists of land of any tenure burthened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsalable or not readily salable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavored to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property; and upon the execution of such disclaimer, the property disclaimed will, if the same is a contract, be deemed to be determined from the date of the order of adjudication; (*g*) and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it will revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there is no person in existence so entitled, then in no case will any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court; and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. Any person injured by the disclaimer is to be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy. (*h*)

The trustee is not entitled to disclaim any property where an application in writing has been made to him by any person * interested in such property, requiring such [* 1318] trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice

(*f*) *Gibson v. Carruthers*, 8 M. & W. 328; *Bowman v. Nash*, 9 B. & C. 145.

(*g*) *In re Sneezum*, 3 Ch. D. 463.

(*h*) Bankruptcy Act, 1869, sect. 23.

whether he disclaims the same or not. (i) The trustee cannot disclaim a leasehold interest without the leave of the court, but a disclaimer without leave is not inoperative. (k) And where the disclaimer is executed, an appeal cannot be heard. (l) If a trustee does not disclaim a continuing contract, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it; and the other party to the contract can prove against the bankrupt's estate for damages. (m) If he does not disclaim, the contract is not determined, but it is not, therefore, adopted by the trustee. (m) But where the trustee took possession of a bankrupt's lease, and when asked to disclaim did not do so, it was held that he was personally responsible for the rent (n) accruing due since his appointment as trustee. (o) Where he has disclaimed, he is not personally liable for the time between his ceasing to occupy the premises and the date of the disclaimer, and probably not even for the time of his actual occupation. (p) After disclaimer, the trustee is not entitled to remove the tenant's fixtures, and the landlord has an absolute title to them as from the date of the order of adjudication. (q) The disclaimer operates to relieve the trustee from all liability under the lease, not merely from liability as from the date of the adjudication. (r) It also operates to give up to the lessor the whole of what is comprised in the demise, chattels as well as land. (s) Where there is a partnership lease with a joint and several covenant to pay the rent, the lessor has a right to prove against the separate estate of each for the injury caused him by the disclaimer. (t) A disclaimer by the trustee operates as a surrender only as between the bankrupt and the trustee, but does not affect the rights or liabilities of third parties, as, for instance, the right of a lessor to distrain upon the property in

(i) *Ib.* sect. 24.

(k) Rule 28 of the Rules of July 7th, 1871; *Reed v. Harvey*, 5 Q. B. D. 184; *Ex parte Ladbury*, 17 Ch. D. 532.

(l) *In re Woods*, 3 Ch. D. 459.

(m) Bankruptcy Act, 1869; 32 & 33 Vict. c. 71, sects. 22-25, 31, 49, 83; *In re Sneezum*, 3 Ch. D. 463.

(n) *Ex parte Dressler*, 9 Ch. D. 252.

(o) *Wilson v. Wallani*, 5 Ex. D. 155; *Titterton v. Cooper*, 9 Q. B. D. 473.

(p) *Lowry v. Barker*, 5 Ex. D. 170, C. A.

(q) *Ex parte Stephens*, 7 Ch. D. 127; *Ex parte Brook*, 10 Ch. D. 100; *Ex parte Glegg*, 19 Ch. D. 7.

(r) *Ex parte Allen*, 20 Ch. D. 341.

(s) *Ex parte Allen*, *supra*.

(t) *Ex parte Corbett*, 14 Ch. D. 122.

the occupation of the bankrupt's underlessee. (*u*) The effect of the disclaimer upon an underlessee is not to [* 1319] entitle the lessor to eject the sub-tenant. (*x*)

Where the owners of certain houses entered into an agreement with H to grant him a lease of the premises for ten years at an annual rent, and after the first year H filed a petition for liquidation by arrangement, and the trustee under the liquidation disclaimed the agreement, it was held that the lessors were entitled to prove as creditors for the injury they had sustained "by the operation of the section;" and that the measure of the injury sustained was the difference between the rent to be paid under the agreement, and what they could obtain for the property at the time of the disclaimer. (*y*)

The word surrender in the twenty-third section is not to be taken in a strictly legal sense; and where an assignee of a lessee becomes bankrupt, and his trustee disclaims, that will not affect the rights and liabilities of the lessor and lessee *inter se*. (*z*) The trustee of a liquidating debtor not having disclaimed, was distrained upon by the landlord for rent accruing due after the commencement of the liquidation, and it was held a good distress, although levied without leave of the court, and although the rent was payable in advance under the terms of the lease. (*a*) The signature of the disclaimer must, it seems, be in the trustee's own handwriting, not in that of his agent or solicitor. (*b*)

Set-Off in Bankruptcy.—The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter was given by the statutes of set-off (*c*) to prevent cross-actions; and if the defendant could have sued the plaintiff for a debt due to him not in his representative character, he might have set it off under those statutes in an action by a plaintiff suing in his individual character also,

(*u*) *Ex parte* Walton, 17 Ch. D. 746; *Harding v. Preece*, 9 Q. B. D. 281. Such underlessee, if his rent is less than the bankrupt's for which the distress is made, may prove for the difference.

(*x*) *Smalley v. Hardinge*, 7 Q. B. D. 524.

(*y*) *Ex parte* Llynvi Coal & Iron Co., *In re* Hide, L. R. 7 Ch. 28.

(*z*) *Smyth v. North*, L. R. 7 Ex. 242; *per* Martin and Piggott, BB., Bramwell, B., dissenting.

(*a*) *Ex parte* Hale, 1 Ch. D. 285; *Ex parte* Dressler, 9 Ch. D. 252.

(*b*) *Wilson v. Wallani*, 5 Ex. D. 155.

(*c*) 2 Geo. II. c. 22, sect. 13, and 8 Geo. II. c. 24, sect. 4.

though the plaintiff and defendant might be claiming their respective debts as a trustee for a third person. If the debts were legal debts due to each in his own right, it was sufficient. But under the bankrupt statutes, the mutual credit clause has not been so construed. The object of this clause is not to avoid cross-actions, — for none would lie against the trustee in bankruptcy, and one against the bankrupt would be unavailing, — but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate; and it does not authorize a set-off, where the debt, though legally due to the debtor from the bankrupt, is really due to him as a trustee for another, and though recoverable in a cross-action, would not have been recovered for his own benefit. (*d*)

Effect of Annuling the Adjudication. — Whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, will be valid; but the property of the debtor who was adjudged a bankrupt will in such case vest in such person as the court may appoint, or in default of any such appointment, revert to the bankrupt for all his estate or interest therein, upon such terms and subject to such conditions, if any, as the court may declare by order. (*e*) A copy of the order of the court annulling the adjudication of a debtor as a bankrupt, must be forthwith published in the *London Gazette*, and advertised locally in the prescribed manner; and the production of a copy of the *Gazette* containing such order will be conclusive evidence of the fact of the adjudication having been annulled, and of the terms of the order annulling the same. (*f*)

(*d*) Parke, B., *Foster v. Wilson*, 12 M. & W. 191, 203. Terry, 2 C. P. D. 403; *In re Chidley*, 1 Ch. D. 177.

(*e*) See *Bailey v. Johnston*, L. R. 7 Ex. 263; 41 L. J. Ex. 211; see *Crew v.* (*f*) Bankruptcy Act, 1869, sect. 81.

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APPENDIX.

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APPENDIX.

NOTE 1. Parol or Simple Contracts, Essential Elements of. — *Parol* contracts are those which are made by word of mouth, and are not reduced to writing. *Simple* contracts are those, which, whether verbal or written, are not under seal.

It is essential to the validity of a contract that it should be made by or between two or more parties, who are legally competent to contract: *Dickerson v. Davis*, 9 Western Rep. (Ind.) 680; that it should be mutual: *Hill v. Roderick*, 4 W. & S. (Penn.) 221; *Crouse v. Holman*, 19 Ind. 20; *McWharter v. McMahan*, 1 Clark (N. Y.), 400; *Keith v. Ken*, 17 Ind. 284; *Sawyer v. Brossart*, 67 Iowa, 678; *Burmester v. Phillips*, 25 Fed. Rep. 805; *Clary v. Ricketts*, 66 Iowa, 362; *Baxter v. Bishop*, 65 Iowa, 582; *Siebold v. Davis*, 67 id. 560; *Forster v. Ulman*, 64 Md. 523; *Trounstone v. Sellers*, 35 Kan. 447; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45; *Walsh v. St. Louis, &c. Ass'n*, 16 Mo. App. 502; *Fitzgerald v. Baker*, 85 Mo. 13; *Central Lunatic Asylum v. Flanagan*, 80 Va. 110; and predicated upon a good consideration: *Strough v. Brown*, 38 Hun (N. Y.), 307; *Allen v. Bryson*, 67 Iowa, 591; *Newton v. Chicago, &c. R. R. Co.*, 66 Iowa, 422; *Voorhees v. Reed*, 17 Ill. App. 21; *Cutter v. Everett*, 33 Me. 201; *Bentley v. Lamb*, 112 Penn. St. 480; *Buckingham v. Ludlum*, 40 N. J. Eq. 422; *Clark v. Turnbull*, 47 N. J. L. 265; *Re Cator*, 33 Minn. 529; *Tucker v. Bartle*, 85 Mo. 514; *Seymour v. Goodrich*, 80 Va. 303; *Buechel v. Buechel*, 65 Wis. 532; *Parsons v. Frost*, 55 Mich. 230; *Laboyteaux v. Sevigart*, 103 Ind. 596; *Knight v. Watts*, 26 W. Va. 175; *Dyer v. McPhee*, 6 Col. 174; *Wilds v. Attix*, 4 Del. Ch. 253; *Hopkins v. Hinkley*, 61 Md. 584; *Bellows v. Sowle*, 55 Vt. 391; *Kuma v. Woodfolk*, 4 Mont. 318; *Barnes v. Hall*, 55 Vt. 420; *Wile v. Wilson*, 93 N. Y. 255; *Stevenson v. Fuller*, 75 Me. 324; *Davidson v. Ford*, 23 W. Va. 617; *Smith v. Phillips*, 77 Va. 548; *Paxson v. Hewson*, 14 Phila. (Penn.) 174; *Dunham v. Johnson*, 135 Mass. 310; *Shade v. Cremiston*, 93 Ind. 591; *Holmes v. Boyd*, 90 Ind. 332; *Stiles v. McClellan*, 6 Cal. 89; *Smith v. Force*, 31 Minn. 119; *Schroeder v. Fink*,

60 Md. 436; *Hunt v. Dederick*, 105 Ind. 555; *Goodenow v. Parkinson*, 67 Iowa, 95; *Chicago, &c. R. R. Co. v. Derkes*, 103 Ind. 520; *Norwood v. Faulkner*, 22 S. C. 367; *Proctor v. Cale*, 104 Ind. 373; *Scott v. Scott*, 105 Ind. 584; *Newton v. Chicago, &c. R. R. Co.*, 66 Iowa, 422.

It would be absurd to say that a person is bound by terms to which he has never in any manner assented; consequently, in order to make a valid and binding contract, *the parties thereto must have agreed upon its terms*; in other words, *they must have mutually assented thereto*. *National Bank v. Hall*, 101 U. S. 50; *Russell v. Perkins*, 1 Mason (U. S.), 368; *Cremer v. Higginson*, 1 id. 323; *Burns v. Barron*, 61 N. Y. 39; *Hunt v. Smith*, 17 Wend. (N. Y.) 179; *Grant v. Naylor*, 4 Cranch (U. S.), 224; *Taylor v. McClung*, 2 Houst. (Del.) 24; *Bleeker v. Hyde*, 3 McLean (U. S.), 279; *Taylor v. Wetmore*, 10 Ohio, 490. The very essence of a contract is a *mutual agreement* of the parties, and so long as any condition upon which an agreement depends is left open there is no contract, because the minds of the parties have not met. *Siebold v. Davis*, 67 Iowa, 560; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45; *Sawyer v. Brossart*, 67 Iowa, 678; *Baxter v. Bishop*, 65 Iowa, 582; *Sawyer v. Hebard*, 58 Vt. 375; *Moyer's Appeal*, 112 Penn. St. 290; *Trairs v. Shiver*, 65 Iowa, 57.

Thus, if A. offers to sell B. a certain horse, for a certain price, and B. accepts the offer, a contract between A. and B. relative to the sale of the horse is thereby created. But if B. accepts the offer provided A. will take his (B.'s) note for the price, no contract exists until A. has signified his acceptance of the condition, nor then, unless A., within a reasonable time, notifies B. of his acquiescence in B.'s proposed terms; and at any time before A. has signified his acquiescence in B.'s proposal B. may withdraw them. *Burmester v. Phillips*, 25 Fed. Rep. 805; *Sawyer v. Brossart*, 67 Iowa, 678; *Siebold v. Davis*, *ante*; *Trounstone v. Sellers*, 35 Kan. 447; *Merriam v. Lapsley*, 2 McCrary (U. S. C. C.), 606.

It is an invariable rule that *an offer of a bargain by one person to another imposes no obligation upon the person making the offer unless it is accepted according to its terms, and any qualification of the offer, or departure from its terms invalidates it, unless acceded to by the person making the offer*. *Moxley v. Moxley*, 2 Met. (Ky.) 309; *Carr v. Duval*, 14 Pet. (U. S.) 277; *McCotter v. New York*, 35 Barb. (N. Y.) 609; *Falls Wire Manuf. Co. v. Broderick*, 12 Mo. App. 378; *Routledge v. Grant*, 4 Bing. 653; *Thomas v. Blackman*, 1 Col. 301; *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225; *Jennes v. Mt. Hope Iron Co.*, 53 Me. 20; *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Bruce v. Pearson*, 3 id. 534; *Andrews v. Garrett*, 6 C. B. n. s. 262; *Holland v. Eyre*, 2 Sim. & Stu. 194; *Jordan v. Norton*, 4 M. & W. 155; *Wontner v. Shairp*, 4 C. B. 404.

In *First National Bank of Quincy v. Hall*, 101 U. S. 43, a firm in Chicago wrote to a bank in Quincy which was cashing drafts on them

by their agent, one Melson: "Hereafter we will pay drafts only on consignments. We cannot advance money a week in actual advance of shipment. The stock must be in transit so as to meet draft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to G. W. Melson. Please acknowledge receipt of this, and oblige —." The bank replied by its cashier: "Your favor received. I note what you say. We have never knowingly advanced any money to Melson on stock to come in. Have always supposed it was in transit; have always taken his word. After this we shall require ship'g bill." The firm did not reply to this letter. *Held*, that the firm did not accept the terms of the bank, and could not rely on its promise in the reply sent by it as a contract for the firm's protection and benefit not to advance money on drafts without a shipping bill. To give it that effect, early and explicit notice to the bank was necessary. *Adams v. Jones*, 12 Pet. 213; *McCollum v. Cushing*, 22 Ark. 543; *White v. Corlies*, 46 N. Y. 468; *Story on Cont.* § 1130. Consequently, where the bank cashed drafts of Melson, which were accepted and paid by the firm, *held*, that the firm could not recover back from the bank the amount paid, even though the drafts were cashed by the bank without the presentment of shipping bills, and there was no stock in transit against which they were drawn. Where there is misunderstanding as to the terms of a contract, neither party is liable in law or equity. *Baldwin v. Middleburger*, 2 Hall, 176; *Coles v. Bowne*, 10 Pai. 526; *Utley v. Donaldson*, 94 U. S. 48. Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound. *Appleby v. Johnson*, L. R. 9 C. P. 158. A proposal to accept or acceptance upon terms varying from those offered is a rejection of the offer. *Baker v. Johnson County*, 37 Iowa, 189; *Jennes v. Mt. Hope Iron Co.*, 53 Me. 20; *Chicago and Great E. R. Co. v. Dane*, 43 N. Y. 240; *Suydam v. Clark*, 2 Sandf. Superior, 133. After the letters were written the firm increased its members, two new partners being taken in without the knowledge of the bank. *Held*, that if the letter did constitute a contract with the firm as it was when it was written, it did not with the new firm. There was no privity between the bank and the new firm. A new party could no more be imported into the contract and imposed upon the bank without its consent than a change could be made in like manner in the other pre-existing stipulations. The bank might have been willing to contract with the firm as it was originally, but not as it was subsequently. Without its assent a thing was wanting which was indispensable to the continuity of the contract. *Barns v. Barron*, 61 N. Y. 39; *Grant v. Naylor*, 4 Cr. 224; *Bleeker v. Hyde*, 3 McLean, 279; *Taylor v. Wetmore*, 10 Ohio, 490; *Taylor v. McClung*, 2 Houst. (Del.) 24; *Hunt v. Smith*, 17 Wend. 179; *Cremer v. Higginson*, 1 Mason, 323; *Russell v. Perkins*, *id.* 368.

But an immaterial addition to an acceptance does not prevent the contract from taking effect. *Clive v. Beaumont*, 1 De G. & S. 397; *Gibbons v. N. E. Met. Asylum District*, 11 Beav. 1; *Branson v. Stannard*, 41 L. T. N. S. 474. Thus in *Ferrier v. Storer*, 63 Iowa, 484, the letter of the defendant containing the offer was as follows: "I want to say to you, if you was coming out here in the fall, I will use your money until you come, and give you ten per cent for it. I have a payment to make on my place before a great while, and it will accommodate me until after harvest. Please let me know as soon as you find it convenient." Twenty-eight days afterwards the defendant replied: "You spoke of the money I sent being useful to you for making a payment on your place. You can use it for that purpose on your own terms mentioned in your last, as I have no other use for it; but I do not like it to lie idle, as it does not pay." It was held that a contract existed. ADAMS, J. said: "The position taken by the plaintiff, that the acceptance was not made within the terms of the offer, rests upon the fact that the offer contained the words, 'if you was coming out here in the fall,' and the acceptance makes no reference to such condition. To this we have to say that it does not appear to us that we can give the words the force of a condition. They seem to have been used rather as an introduction to, or reason for, the plaintiff's proposal, and not as essentially concerning any object which the plaintiff was desiring to secure. In our opinion the acceptance was substantially within the terms of the offer."

There is no question but that an offer may be withdrawn before acceptance. *Honeyman v. Marryatt*, 6 H. L. Cas. 112; *Chinnock v. Marchioness of Ely*, 6 N. R. 1; *Eskridge v. Glover*, 5 S. & P. (Ala.) 264; *Faulkner v. Hebard*, 26 Vt. 452; *Beckwith v. Cheever*, 21 N. H. 41; *Burton v. Shotwell*, 13 Bush (Ky.), 271. And the same rule applies to an acceptance, and it may be retracted *before* or *simultaneously with its receipt*. *Dunmore v. Alexander*, 9 Shaw & Dunl. 190. The rule is that if the proposition be made in writing, and sent by the post, the person making the offer can retract by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail the contract is completely closed as to both parties. Although, therefore, a letter containing a retraction of the offer be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of such letter of assent. *Wheat v. Cross*, 31 Md. 99. As to retraction of acceptance, it is said that the person assenting cannot even stop his letter on the road after it is once mailed. Story Cont. § 498.

In *Byrne v. Tienhoven*, 42 L. T. N. S. 871, it was held that the withdrawal of an offer, made and accepted by letters sent through the post, is inoperative if the notice of withdrawal does not reach the person accepting until after the letter of acceptance has been posted, unless

authority has been given to notify a withdrawal by merely posting a letter.

LINDLEY, J. said: " This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tin plates, pursuant to an alleged contract which I will refer to presently. The action was tried at Cardiff before myself without a jury, and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375. The defendants carried on business at Cardiff, and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on 1st October, 1879, and received by them on the 11th, and accepted by telegram and a letter sent to the defendants on 11th and 15th Oct., respectively.

" These letters and telegrams would, if they stood alone, plainly constitute a contract binding on both parties. The defendants, in their pleadings, say that there was no sufficient writing within the statute of frauds, and that they contracted only as agents, but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action, which remain to be considered. First, they say that the offer made by their letter of the 1st Oct. was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to this are as follows: On the 8th Oct. the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. This letter, so far as material, was as follows: ' 8th Oct. 1879. — From Messrs. Leon Van Tienhoven and Co., Cardiff, to Messrs. Byrne and Co., New York. — Confirming our respects of the 1st inst., we hasten to inform you that there having been a regular panic in the tin-plate market during the last few days, which has caused prices to run up about 25 per cent, we are reluctantly compelled to withdraw any offers we have made to our constituents, and must, therefore, also consider our offer to you for 1000 boxes Hensols, at 17s. 6d., to be cancelled from this date. Yours faithfully, Leon Van Tienhoven & Co.' This letter of the 8th Oct. reached the plaintiffs on the 20th Oct. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. This letter is followed by one from the defendants to the plaintiffs of the 25th Oct., refusing to complete. There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. *Routledge v. Grant*, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: (1) Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has

been sent. (2) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent. It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all. This is the view taken in the United States (see *Tayloe v. Merchants' Fire Insurance Company*, 9 How. Sup. Ct. Rep. 390, cited in Benjamin on Sales, pp. 56 and 58), and is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on the Principles of Contracts, 2d ed., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, namely, whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st Oct. The withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris's Case*, 26 L. T. Rep. n. s. 781; 7 Ch. App. 587; *Dunlop v. Higgins*, 1 H. L. Cas. 881), even although it never reaches its destination. *Household Fire Company v. Grant*, 41 L. T. Rep. n. s. 298; 4 Ex. Div. 216, qualifying, if not overruling, *British & American Telegraph Company v. Colson*, 23 L. T. Rep. n. s. 868; L. R. 6 Exch. 108. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it; but this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th Oct. is to be treated as communicated to the plaintiffs on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they

had accepted the offer both by telegram and by post, and they had themselves resold the tin-plates at a profit. In my opinion, the withdrawal by the defendants on the 8th Oct. of their offer of the 1st was inoperative, and a complete contract binding on both parties was entered into on the 11th Oct., when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties."

A proposal to accept, or an acceptance varying the terms of the offer, is treated as a rejection of the proposal, and puts an end to the negotiations, unless the original offer is renewed or the proposer assents to the modification. *Fox v. Turner*, 1 Brad. (Ill.) 153; *Minneapolis, &c. R. R. Co. v. Columbus Rolling Mill*, 119 U. S. 148; *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225; *Carr v. Duval*, 14 Pet. (U. S.) 77.

If a time within which an offer is to be accepted is specified, it must be accepted within that time, but if no time is specified, *the acceptance must be made within a reasonable time*; and what is a reasonable time is a question of fact for the jury in view of the circumstances. *Stone v. Harmon*, 31 Minn. 512. In *Wilson v. Roots*, 8 Western Rep. (Ill.) 67, the court expresses the true doctrine, to wit, that where no time is specified within which an act is to be done, it must be done within a reasonable time. See also *Washburn v. Fletcher*, 42 Wis. 152; *Taylor v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Abbott v. Shepherd*, 48 N. H. 14; *Trevor v. Wood*, 36 N. Y. 307; *Wheat v. Cross*, 31 Md. 99; *Averill v. Hedge*, 12 Conn. 436; *Falls v. Gaither*, 9 Port. (Ala.) 614; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339; *Levy v. Cohen*, 4 Ga. 1; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

It is sometimes said that an offer subsists until it is withdrawn or answered: *Hillock v. Ins. Co.*, 26 N. J. L. 268, but the absurdity of this rule, strictly construed, is apparent. Thus, suppose A., in July, writes B. that he will sell him 500 crates of strawberries at \$1.00 per crate; and B., in September, writes A. that he will take the 500 crates at the price named, does any one for a moment suppose that A. is bound to furnish the berries or pay the consequent damages? By no means. In all cases, an offer must be accepted within a reasonable time, *in view of the circumstances*, or it is treated as withdrawn. *Martin v. Black*, 21 Ala. 721; *Taylor v. Renner*, 35 Barb. (N. Y.) 272; *Chicago, &c. R. R. Co. v. Dane*,

43 N. Y. 240; *Dunlop v. Higgins*, 1 H. L. Cas. 381. An offer may be withdrawn at any time before it is accepted, because, until accepted, the minds of the parties have not met, and consequently no contract exists. *School Directors v. Trefethren*, 10 Ill. App. 127; *Hastings, &c. R. R. Co. v. Miles*, 56 Iowa, 447. The unqualified acceptance of an offer by the person to whom it was made before he has notice of its withdrawal, makes a binding contract between the parties. Thus, if an offer to contract is sent by A. to B. by mail and B. deposits in the mail properly addressed to A. a letter accepting the offer, a binding contract exists from the instant the letter is deposited in the mail, although A., before the receipt of the letter accepting his offer, has without the knowledge of B. retracted it. *Hamilton v. Lycoming Ins. Co.* 5 Penn. St. 339; *Chiles v. Nelson*, 7 Dana (Ky.), 281. Even though the letter was not received by A. *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307. *Palmer v. Phenix, &c. L. Ins. Co.*, 84 N. Y. 63, is a strong case upon this point.

But if the terms of the offer are such as to indicate an intention not to hold it open unless an acceptance is *received* by the person making the offer within a certain time, it would seem that it must appear not only that its acceptance was mailed, but also that it was actually received by the proposer. Thus, in a Massachusetts case, an offer was made by letter in which the proposer requested an answer by telegraph, "yes" or "no," and stated that unless he *received* the answer by a certain date, he should conclude "no," it was held that the offer was made dependent upon the actual receipt of the telegram on or before the date named. *Lewis v. Browning*, 130 Mass. 172. In *Maclay v. Harney*, 90 Ill. 525, a similar doctrine was held. In *Household, &c. Ins. Co. v. Grant*, 4 Ex. Div. 215, the rule was announced *that a contract is binding upon the proposer as soon as a letter of acceptance properly directed has been posted; provided the acceptance was thus made within a reasonable time after the offer was made, even though the letter was never received by the proposer.* This rule, however, is subject to the condition *that the offer was made by mail, that it was the evident intention of the proposer that the acceptance was to be signified by mail, and that no definite time within which the acceptance was to be received by the proposer, is named in the offer.* If the proposal was made upon the terms that it should be accepted by telegraph, then an acceptance signified by post would be insufficient. So if the offer is made by mail upon condition that the proposer receives notice of its acceptance by a certain time, then the question of contract or not depends upon the actual receipt of the letter of acceptance.

In the case last cited in the C. P. Div., LOPEZ, J., said, "On the 30th September, 1874, the defendant, who acted for the plaintiffs at Swansea, applied through the manager for 100 shares, and handed him a written application for shares in the usual form. The manager laid the application before the plaintiffs, and an allotment letter was prepared in the usual form. The defendant never received this letter, or any notice of

calls or dividends. His name was duly entered on the list of shareholders. Evidence was given on behalf of the plaintiffs to prove the postage of the allotment letter of the 20th October. The defendant swore he had not received any letter about the shares until the 19th March, 1877. I asked the jury if they thought the letter of allotment of the 20th October was in fact posted ; they replied in the affirmative. I also asked them if they thought the letter of allotment was in fact received by the defendant; to this they replied in the negative. It was urged by Mr. Finlay for the defendant, that the letter of application was sent by hand and there was no request to be answered by post. The letter of application, it will be observed, is in the usual form, and contains the usual particulars of name and address, and having regard to the position of the plaintiff's office and the defendant's residence, the ordinary and natural mode of transmission of the allotment letter would be through the post. The question raised in this case is, whether the contract between the plaintiffs and the defendant was complete when the letter accepting the defendant's offer was put into the post by the plaintiffs, or not until it was actually received by the defendant. The question is difficult, and the decisions are conflicting. It appears to me, however, that regard being had to the general inclination of the authorities and to mercantile convenience, the plaintiffs are entitled to succeed. I will refer to only a few of the leading cases. In *Dunlop v. Higgins*, 1 H. L. Cas. 381, the proposal did not describe any time, but the nature of it implied the answer must be speedy. The acceptance was not posted by the earliest post. The court decided that the contract was binding on the proposer. Lord COTTENHAM appears to have thought that the contract was absolutely concluded by the posting the acceptance (within the prescribed, namely, a reasonable time), and that it mattered not what became of it afterward. In *Duncan v. Topham*, 8 C. B. 225, not long afterward, WILDE, C. J., MAULE, J., and CRESWELL, J., seem to have so understood it, so that the contract would be binding, though the letter did not arrive at all. In the case of the *British and American Telegraph Company v. Colson*, L. R. 6 Exch. 108 ; 23 L. T. Rep. n. s. 868, it was found as a fact that the letter of allotment was never received. The court held the defendant was not bound, and endeavored to restrict the effect of *Dunlop v. Higgins*. In the *Imperial Land Company of Marseilles, Harris's Case*, L. R. 7 Ch. 587 ; 26 L. T. Rep. n. s. 781, the letter of allotment was duly received, but in the mean time the applicant had written a letter withdrawing his application on the ground of the delay in answering. The Lords Justices held the applicant was bound, on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *The British & American Telegraph Company v. Colson*. In the case of *Brogden v. The Metropolitan Railway Company*, L. R. 2 H. L. 691, Lord BLACKBURN says : " So again when in *Harris's Case* a person writes a letter and says, ' I offer you an allotment of shares,' and he expressly or impliedly says,

‘If you agree with me send an answer by post,’ then as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound, I agree that the contract is perfectly plain and clear.” And again, at page 692, “I take it that which was said 300 years ago and more is the law to this day, and is quite what MELLISH, L. J., in Harris’s Case accurately states, that, ‘when it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post this letter the offer is accepted.’ Acting upon these cases I came to the conclusion that the contract here was complete on the posting of the allotment letter, and that it is immaterial whether the defendant actually received that acceptance of his offer. There is doubtless hardship caused to the proposer if the acceptance does not come to hand, but against this he may guard himself by making the proposal expressly conditioned on the arrival of the answer within a definite time. It would be difficult to exaggerate the mischievous consequences to the commercial world which would follow if it were held that a contract was not complete until the letter accepting the offer had reached the proposer, and that it might be revoked at any time until the letter accepting it had been actually received.” See also *Ferrier v. Storer*, 63 Iowa, 484; *Halllock v. Ins. Co.*, 26 N. J. L. 268; *Taylor v. Merchants’ Ins. Co.*, 9 How. (U. S.) 390; *Moore v. Pierson*, 6 Iowa, 292; *Martin v. Frith*, 6 Wend. 103; *Brisban v. Boyd*, 4 Paige (N. Y.), 17; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Johnson v. Fessler*, 7 Watts (Penn.), 48; *Abbott v. Shepard*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196; *Craig v. Harper*, 3 Cush. (Mass.) 158.

In order to constitute a contract by the acceptance of an offer, *all the essential terms* must have been embodied in the offer and acceptance, and the question in all cases is, can the terms be sufficiently ascertained from the correspondence so that the court could decree a specific performance. In *Brown v. N. Y. Central R. R. Co.*, 44 N. Y. 79, this proposition was illustrated. In that case an agent of the plaintiff wrote to the defendant’s agent in March, proposing to dispose of the plaintiff’s railroad by a lease to the defendant at \$60,000 per year, with the privilege of buying the road, *at a time to be agreed upon*, for \$10,000,000, the rent to commence April 1st, if the plaintiffs were then ready to give possession, and saying “the form and covenants of the lease and the rental certificates and other details will require consideration, and can be hereafter arranged.” The defendant’s agent replied by letter accepting “the proposal suggested in your note, on the terms therein suggested,” adding “this lease to be perpetual unless terminated by purchase.” It was held that this correspondence did not constitute a contract. In *Lyman v. Robinson*, 14 Allen (Mass.), 254, FOSTER, J., said, “A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary nego-

tiation." Lord WENSLEYDALE, in *Ridgway v. Wharton*, 6 H. L. Cas. 304, says, "An agreement, to be finally settled, must comprise all the terms which the parties intended to introduce into the agreement. *An agreement to enter into an agreement* upon terms to be afterwards settled between the parties, is a contradiction of terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled; until those terms are settled he is perfectly at liberty to retire from the bargain." The rule may be said to be that a contract cannot be established by the correspondence of the parties until the latest proposition of one is accepted by the other. When all the terms have been settled, a contract exists from the moment a letter assenting thereto is deposited in the mail. *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646.

NOTE 2. Valuable Considerations. — A promise to pay a person for doing an act which he is legally bound or which it is his duty to do is a mere *nudum pactum*, and will not support an action (*Ellison v. Jackson*, 12 Cal. 542; *Russell v. Buck*, 11 Vt. 166; *Cole v. Shurtleff*, 41 Vt. 311; *Huston v. United States*, 22 Law Rep. 52; *Cummings v. United States*, 21 id. 752; *Merrick v. Giddings*, 1 Mackay (D. C.), 394), either at law, or in equity, however just the claim may be. *Dittlejohn v. Patillo*, 2 Hawks (N. C.), 302; *Washington, &c. Bank v. Farmer's Bank*, 4 Johns. (N. Y.) 62. And the rule is the same, whether the promise is by parol or in writing. *Perrine v. Cheesman*, 11 N. J. L. 174; *Cook v. Bradley*, 7 Conn. 57; *Beverley v. Holmes*, 4 Munf. (Va.) 45; *Clark v. Small*, 6 Yerg. (Tenn.) 418.

It is not necessary, to constitute a consideration, that the promisor should derive a benefit from the contract. It is sufficient if something valuable flows from the promisee, and that the promise is the inducement of the contract. *United States v. Linn*, 15 Pet. (U. S.) 290; *Violett v. Patton*, 5 Cranch (U. S.), 142; *Dorwin v. Smith*, 35 Vt. 69; *Hilton v. Southwick*, 17 Me. 303; *Underhill v. Gibson*, 2 N. H. 352; *Dyer v. McPhee*, 6 Col. 174. Although it is merely nominal, if given or stipulated in good faith. *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Harlan v. Harlan*, 20 Penn. St. 303; *Newhall v. Paige*, 10 Gray (Mass.), 366. And a mere hope, expectation, or possibility of benefit, is sufficient. *Garrow v. Davis*, 15 How. (U. S.) 272; *Clark v. Sigourney*, 17 Conn. 511. A release, purporting to be given for *one dollar*, expresses a good consideration, however large the claim released may be. *Ham v. Van Orden*, 84 N. Y. 257. Any risk or liability assumed upon the strength of the promise of another, is sufficient. *Sands v. Crooke*, 46 N. Y. 564; *Chapin v. Lapham*, 20 Pick. (Mass.) 467; *Violett v. Patton*, 5 Cranch (U. S.), 142. It is enough if the promisee has parted with some right. *Cary v. White*, 52 N. Y. 138; *Weaver v. Banden*, 49 N. Y. 286; *Park Bank v. Watson*, 42 N. Y. 490; *Chrysler v. Renois*, 43 id. 209; *Cardell v. Hicks*, 37 id. 458; *Traders' Bank v. Bradner*, 43 id. 379; *Brown v. Leavitt*, 31 id. 113; *Cates v. Boles*, 78 Ind. 285; *Ecker v. McAllister*, 54 Md. 362; *Smith v.*

Easton, 54 Md. 138; Leonard v. Duffin, 94 Penn. St. 218; Duffin v. Roberts, 9 Ill. App. 103; Little v. Allen, 56 Tex. 133; Schenck v. Lithoff, 75 Ind. 485; Ring v. Kelly, 10 Mo. App. 411; Wharton v. Anderson, 28 Minn. 301; Ware v. Morgan, 67 Ala. 461; Dawson v. Beall, 68 Ga. 328; Hart's Estate, 13 Phila. (Penn.) 226; Berger's Appeal, 96 Penn. St. 443; Washburn & Moen Manuf. Co. v. Wilson, 48 N. Y. Superior Ct. 159; Darrow v. Walker, 48 id. 6; Rogers v. Union Stone Co., 134 Mass. 31; Howe v. Taggart, 133 Mass. 284; Sinclair v. Reddington, 58 N. H. 364; Flannagan v. Kilcome, 58 id. 443; Washburn v. Pintsch, 17 Fed. Rep. 582; Austyn v. McLure, 4 Dall. (U. S.) 227; Memphis v. Brown, 20 Wall. (U. S.) 289; Planter's Bank v. Union Bank, 16 id. 483; Lawrence v. McCalmont, 2 How. (U. S.) 426; Gratz v. Cohen, 11 How. (U. S.) 1; Hall v. Weare, 92 U. S. 728; Dunham v. Griswold, 100 N. Y. 224; Harman v. Adams, 120 U. S. 363. Or done some act which he was under no obligation to do, and for the doing of which the promise was an inducement. Snow v. Hix, 54 Vt. 478; Lydick v. B. & O. R. R. Co., 17 W. Va. 427; Frank v. Irgens, 27 Minn. 43; Stevenson v. Robertson, 55 Iowa, 689; Parker v. Enslow, 102 Ill. 27; Merrick v. Giddings, 1 Mackay (D. C.), 934; Gove v. Newton, 58 N. H. 359; Reed v. Golden, 28 Kan. 632; Pond v. Starkweather, 99 N. Y. 411; Beckwith v. Brackett, 97 N. Y. 52; Morehouse v. Second Nat. Bank, 98 N. Y. 503; Todd v. Weber, 95 N. Y. 181. But a promise made by a person to a party, for doing an act which it is his legal duty to do, will not support an action. Seybolt v. N. Y., Lake Erie, &c. R. R. Co., 95 N. Y. 562; Vanderbilt v. Schreyer, 91 N. Y. 392; Crosby v. Wood, 6 N. Y. 369; Sherwin v. Brigham, 39 Ohio St. 137; Tilden v. New York, 56 Barb. (N. Y.) 340; Keffer v. Grayson, 76 Va. 517; Hume v. Mazelin, 84 Ind. 574; Stuber v. Schack, 83 Ill. 191; Eblin v. Miller, 78 Ky. 371; Ehle v. Judson, 24 Wend. (N. Y.) 97; Smith v. Ware, 13 Johns. (N. Y.) 257. Whether that duty arises from a contract, or is imposed by the law. Crosby v. Wood, *ante*; Ayres v. R. R. Co., 52 Iowa, 478; Conover v. Stilwell, 34 N. J. L. 54; Reynolds v. Nugent, 25 Ind. 325; Holmes v. Boyd, 90 Ind. 332; Dow v. Chambers, 14 Phila. (Penn.) 647; as, if the statute has imposed a duty upon an officer, and prescribed a fee therefor, a promise to pay him more for the service which the law requires from him, is wholly without consideration. Decatur v. Vermillion, 77 Ill. 315; Burke v. Webb, 32 Mich. 173; Hatch v. Mann, 15 Wend. (N. Y.) 44; Evans v. Trenton, 24 N. J. L. 764; Joliet v. Tuohey, 1 Bradw. (Ill.) 483; Morrell v. Quarles, 35 Ala. 544; Smith v. Whildin, 10 Penn. St. 39.

So where a person contracts to render his services for a certain time, for a certain price, a promise to pay him more is a *nudum pactum*. Guthrie v. Merrill, 4 Kan. 187; Fraser v. United States, 16 Court of Claims (U. S.), 507; United States v. Martin, 94 U. S. 400; McCarthy v. New York, 96 N. Y. 1; Luske v. Hotchkiss, 37 Conn. 219; Sweaney v. Hunter, 1 Murph. (N. C.) 181. But, where the service which forms

the basis of the promise is outside of that required by the statute or the contract, it affords a good consideration for the promise. *Hatch v. Mann, ante.*

Where a certain sum is due, about the amount of which there is no dispute, a promise on the part of the creditors to take from the debtor a less sum cannot be enforced, because there is no consideration therefor. *Roberts v. Barnum*, 80 Ky. 28; *Weber v. Couch*, 134 Mass. 26; *Bunge v. Koop*, 48 N. Y. 225; *Rose v. Daniels*, 8 R. I. 381; *Lankton v. Stewart*, 27 Minn. 346; *Bliss v. Swartz*, 7 Laus. (N. Y.) 186; *Wills v. Gammill*, 67 Mo. 730; *Bryan v. Foy*, 69 N. C. 45; *Bryan v. Brazil*, 52 Iowa, 359; *Line v. Nelson*, 39 N. J. L. 358; *Lathrop v. Paige*, 129 Mass. 19; *Smith v. Phillips*, 77 Va. 548; *Bailey v. Day*, 26 Me. 88; *McKenzie v. Culbreth*, 66 N. C. 534; *Longworth v. Higham*, 89 Ind. 352; *Rea v. Owings*, 37 Iowa, 262; *Curran v. Rummell*, 118 Mass. 482; *Moore v. Hilton*, 1 Dev. Eq. (N. C.) 433; *Panzerbieter v. Waydill*, 21 Hun (N. Y.), 161. But, where a creditor, in consideration that the debtor will pay the debt *before it is due*, agrees to take a less sum than the actual amount, the debtor, on payment of such sum, discharges the debt. *Schweider v. Lang*, 29 Minn. 254; *Lanneberg v. Ridell*, 16 id. 83; *Brooks v. White*, 2 Met. (Mass.) 283. And the same rule prevails when the promise is made in consideration that the debtor will pay at a different place from that agreed upon. *Fenwick v. Phillips*, 3 Met. (Ky.) 87; *McKenzie v. Culbreth, ante*; *Jones v. Perkins*, 29 Miss. 139.

A promise made by a creditor to extend the time of payment of a debt, in consideration that the debtor will pay interest, which he was already legally liable to pay, is without consideration. *Dow v. Chambers*, 14 Phila. (Penn.) 174; *Holmes v. Boyd*, 90 Ind. 352; *Stuber v. Schack, ante.*

NOTE 3. Great inadequacy of consideration does not necessarily defeat a contract, but it is a suspicious element which suggests fraud, and where the inadequacy is gross, it is a material circumstance in establishing fraud, although of itself not sufficient. *Haines v. Haines*, 6 Md. 435; *Newhall v. Paige*, 10 Gray (Mass.), 336; *Talbot v. Hooser*, 12 Bush (Ky.), 408; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Hardeman v. Burge*, 10 Yerg. (Tenn.) 202; *McMullen v. Gable*, 47 Ill. 67; *Knobb v. Lindsay*, 5 Ohio, 468; *Earl v. Peck*, 64 N. Y. 596; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *White v. Flora*, 2 Tenn. 426; *Worth v. Case*, 42 N. Y. 362; *Odineal v. Barry*, 24 Miss. 9; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209; *Nash v. Lull*, 102 Mass. 60; *Comstock v. Purple*, 49 Ill. 158; *Hallett v. Collins*, 10 How. (U. S.) 174. But, of itself, in the absence of actual fraud, mere inadequacy of consideration will not defeat a contract. *Troy Academy v. Nelson*, 24 Vt. 189; *Kidder v. Chamberlain*, 41 Vt. 62; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *George v. Richardson*, Gilm. (Va.) 230; *Follett v. Rose*, 3 McLean (U. S.), 322;

Schnell v. Nell, 17 Ind. 29; Stewart v. State, 2 H. & G. (Md.) 114; Knobb v. Lindsay, 5 Ohio, 471.

NOTE 4. Any loss, prejudice, or inconvenience to the promisee is a good consideration for a promise. Lockwood v. Bull, 1 Cow. (N. Y.) 322; Spaulding v. Crawford, 27 Tex. 155; Etheridge v. Thompson, 7 Ired. L. (N. C.) 127; Humphrey v. Haskell, 7 Allen (Mass.), 497; Perry v. Bucknam, 33 Vt. 7; Weld v. Nichols, 17 Pick. (Mass.) 538; Calhoun v. Calhoun, 37 Miss. 668; Cracker v. Higgins, 7 Conn. 347; Farmer v. Stewart, 2 N. H. 97; Montgomery v. Morris, 32 Ga. 173; Dickerson v. Derrickson, 39 Ill. 574; Edson v. Fuller, 22 N. H. 183; Harlan v. Harlan, 20 Penn. St. 303; Barringer v. Warden, 12 Cal. 311; Bell v. Greenwood, 21 Ark. 249; Matthews v. Merrick, 4 Md. Ch. 364; Warren v. Wheeler, 21 Me. 484; Weston v. Hight, 18 Me. 281; Trafton v. Rogers, 13 Me. 315; Mills v. Brown, 11 Iowa, 314; Wright v. Bartlett, 43 N. H. 548; Sheldon v. Harding, 44 Ill. 68; Taylor v. Baker, 1 Fla. 245; Clark v. Gaylord, 24 Conn. 484; Taylor v. Meek, 4 Blackf. (Ind.) 388; West v. Hosea, 5 Harr. (Del.) 232; Kinsey v. Wallace, 36 Cal. 462; Carr v. Card, 34 Mo. 513; Goodpaster v. Porter, 11 Iowa, 161; Hildreth v. Pinkerton, 29 N. H. 227; Bryan v. Dyer, 28 Ill. 188.

NOTE 5. A promise to pay for services to be rendered for a third person are binding upon the promisor, if made at his request, or if his promise was the inducement to the rendition of the service. Allen v. Woodward, 22 N. H. 544; Comstock v. Smith, 7 Johns. (N. Y.) 87. Where there is a request and a promise to pay for services, even though the person making the promise is under no legal liability to have the service performed, yet the promisor is liable therefor. White v. Martin, 38 Ala. 147. But from a mere request a promise cannot, under all circumstances, be inferred. Batchelder v. McKenny, 36 Me. 355. Where services which are highly beneficial to a person are rendered *without his knowledge or consent*, a promise to pay therefor cannot be inferred. Caldwell v. Eneas, 2 Mill (S. C.), 348; Anderson v. Hamilton, 25 Penn. St. 75; Fox v. Sloo, 10 La. An. 11; Watson v. Ledoux, 8 La. An. 66; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; Chiniquy v. Deline, 37 Ill. 237; Handy v. Clark, 4 Houst. (Del.) 16; Hazlip v. Leggett, 6 Sm. & M. (Miss.) 326; Smith v. Watson, 14 Vt. 332; Dunbar v. Williams, 10 Johns. (N. Y.) 249; Boyd v. Sappington, 4 Watts (Penn.), 247; Norris v. Dodge, 28 Ind. 190; Curry v. Rogers, 21 N. H. 247; Northern, &c. R. R. Co. v. Prentiss, 11 Md. 119; Low v. Conn., &c. R. R. Co., 45 N. H. 370.

NOTE 6. Snow v. Hix, 54 Vt. 478; Young v. Hill, 67 N. Y. 162; Mills v. Wyman, 3 Pick. (Mass.) 207; Tomlinson v. Smith, 2 Iowa, 39; Freeman v. Robinson, 39 N. J. L. 383; Bestor v. Roberts, 58 Ala. 331:

Loomis v. Newhall, 15 Pick. (Mass.) 159; *Allen v. Woodard*, 22 N. H. 544; *Comstock v. Smith*, 7 Johns. (N. Y.) 87; *Barlow v. Smith*, 4 Vt. 139.

NOTE 7. There is no difference in the rule as to consideration, between a written and oral simple contract; and a written contract is on the same footing with an oral agreement, and, unless supported by a good consideration, is a mere *nudum pactum*. *Mosby v. Leeds*, 3 Call (Va.), 439; *Thacher v. Dinsmore*, 5 Mass. 301; *Tenney v. Prince*, 4 Pick. (Mass.) 243; *Perrine v. Cheesman*, 11 N. J. L. 174; *People v. Shall*, 9 Cow. (N. Y.) 778; *Brown v. Adams*, 1 Stew. (Ala.) 51; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Doehler v. Waters*, 30 Ga. 344; *Larue v. Bryant*, 32 Ga. 235; *Barnett v. Bisco*, 4 Johns. (N. Y.) 28. Thus, a promise to pay the debt of another must not only be in writing, but must also be supported by a good consideration. *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Cutler v. Everett*, 33 Me. 201; *Pfeifer v. Kingsland*, 25 Mo. 66; *Comstock v. Breed*, 12 Cal. 286; *Reading R. R. Co. v. Johnson*, 7 Wis. (Penn.) 317; *Bailey v. Freeman*, 4 Johns. (N. Y.) 280; *Cobb v. Paige*, 17 Penn. St. 469. It is not the extent of the benefit resulting from, but the validity of the consideration, which controls. *Randle v. Harris*, 6 Yerg. (Tenn.) 508.

NOTE 8. For a full statement of the rules applying in reference to offers of bargains, acceptance thereof, &c., see Note 2, *ante*.

NOTE 9. Contracts are implied, where the facts are such as to warrant the court in inferring a promise, although there is in fact no contract. Thus, where a person has by an act of trespass taken the property of another and converted it into money, the law implies a promise on the part of the trespasser to pay the owner therefor, and he may waive the tort and sue upon such implied promise. *Strother v. Butler*, 17 Ala. 733; *Bethlehem v. Perseverance F. Ins. Co.*, 82 Penn. St. 445; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120; *Jones v. Baird*, 7 Jones (N. C.), 152. But where the taking or withholding of the property is purely tortious, and the wrong-doer has not converted it into money, no promise to pay therefor can be implied. *Fuller v. Duren*, 36 Ala. 73; *Schweizer v. Weiber*, 6 Rich. (S. C.) 159; *McCoun v. N. Y. Central R. R. Co.*, 50 N. Y. 176; *Balch v. Patten*, 45 Me. 141; *Jones v. Hoar*, 5 Pick. (Mass.) 285. Where beneficial services are rendered for a person, without any special employment by him, yet if he, knowing all the facts, stands by and sees the services performed and makes no objection thereto, a promise to pay a reasonable sum for such services is implied. *Christie v. Sawyer*, 44 N. H. 298; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Goodall v. Bedell*, 20 N. H. 205; *De Wolf v. Chicago*, 62 Ill. 253; *R. R. Co. v. Ketchum*, 27 Conn. 170. But, in this class of cases, the relationship of the parties and all the attendant circumstances are to be taken into account in deter-

mining whether the services were rendered gratuitously, or under an expectation that they would be paid for. *Crane v. Bandonine*, 55 N. Y. 256; *Sussdorf v. Schmidt*, 55 id. 319; *Greene v. Roberts*, 47 Barb. (N. Y.) 521; *Campbell v. Campbell*, 65 Barb. (N. Y.) 645; *Shakspeare v. Markham*, 10 Humph. (Tenn.) 311; *Lee v. Lee*, 6 G. & J. (Md.) 316; *Martin v. Wright*, 13 Wend. (N. Y.) 460; *Eaton v. Bentou*, 2 Hill (N. Y.), 576; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379; *Buck v. Amidon*, 41 How. Pr. (N. Y.) 370. When a person contracts to perform certain services for another, the law implies a contract on his part that he is possessed of the requisite capacity, knowledge, and skill to perform the particular service, and that he will perform it properly; and this rule applies to professional men, as physicians: *Higgins v. McCabe*, 126 Mass. 13; *Hathorn v. Richmond*, 48 Vt. 557; *Simonds v. Henry*, 39 Me. 155; *Wood v. Clapp*, 4 Sneed (Tenn.), 65; *Utle v. Burns*, 70 Ill. 162; *Long v. Morrison*, 14 Ind. 595; *Landon v. Humphrey*, 9 Conn.; *Craig v. Chambers*, 17 Ohio St. 253; and mechanics or other persons, according to the service which they contract to render. *Parker v. Platt*, 74 Ill. 430; *Newman v. Reagan*, 65 Ga. 512; *Waugh v. Shunk*, Penn. St. 130; *Eaton v. Woolly*, 28 Wis. 628; *Keith v. Bliss*, 10 Bradw. (Ill.) 424; *Griffin v. Haynes*, 24 La. An. 480; *Page v. Wells*, 37 Mich. 415; *Brink v. Fay*, 7 Daly (N. Y. C. P.), 562.

When a person accepts any benefit from another, *which he had no reason to suppose was gratuitously conferred*, and which he could accept or not at his option, and which is commonly compensated for in money, the law implies a promise to pay therefor. *Hathaway v. Winnesbick*, 80 Iowa, 596; *Morris v. Morris*, 4 Gratt. (Va.) 293; *Driscoll v. Independent School District*, 61 Iowa, 426; *Adams v. Crosby*, 48 Ind. 153; *Jones v. Wood*, 77 Penn. St. 208; *Elder v. Hood*, 38 Ill. 533; *McCrary v. Ruddick*, 33 Iowa, 521; *Ensey v. Hines*, 30 Kan. 704; *Moreland v. Davidson*, 72 Penn. St. 371; *Horton v. Woolner*, 71 Ala. 452; *St. Patrick's Church v. Abst*, 76 Ill. 252; *Ford v. Ward*, 26 Ark. 360; *Hurst v. Hite*, 20 W. Va. 183; *Camfrancq v. Pilie*, 1 La. An. 197; *James v. Bixby*, 11 Mass. 34; *Dougherty v. Whitehead*, 31 Mo. 255; *Harkinson v. Dry Placer, &c. Co.*, 6 Cal. 269. *The circumstances of each case are controlling.* Thus in *Seligson v. Taylor Compress Co.*, 56 Tex. 219, the plaintiff had notice that the defendant carried on the business of warehouseman as an adjunct to its main business of compressing cotton, and charged a higher rate for storage when the cotton was removed uncompressed; with this knowledge, he sent a quantity of cotton to be stored merely. It was held that he impliedly contracted to pay the higher rate, although he had always protested against it, and although there were no other warehouses except those carried on by compress companies. See also *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558; *Plimpton v. Gleason*, 57 Vt. 604; *San Joaquin Valley Bank v. Bours*, 65 Cal. 247; *Young v. Heater*, 63 Iowa, 608; *Pacific R. R. Co. v. United States*, 20 Ct.

of Cl. (U. S.) 426; Fross' Appeal, 105 Penn. St. 258; Batkin v. McIntire, 81 Mo. 557; Carrol v. United States, 20 Ct. of Cl. 426; Simpson v. N. Y., West Shore, &c. R. R. Co., 51 N. Y. Superior Ct. 419; Mills v. Joiner, 20 Fla. 479. But where the benefit is conferred under circumstances that indicate that it was voluntarily and gratuitously conferred, no promise to pay therefor can be implied. Sawyer v. Hebard, 58 Vt. 375; Potter v. Carpenter, 76 N. Y. 157; Keegan v. Malone, 62 Iowa, 208; White v. Jones, 14 La. An. 681; Judge v. Barrows, 59 Wis. 115; Western Screw, &c. Co. v. Consley, 72 Ill. 531; Jared v. Vanvleet, 13 Bradw. (Ill.) 334; Phill's Estate, 14 Phila. (Penn.) 330; Pew v. Gloucester National Bank, 130 Mass. 391; Davis v. Bacon, 1 Ariz. 240; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; Mayer's Appeal, 112 Penn. St. 290; Traver v. Shiner, 65 Iowa, 57; Guckian v. Riley, 135 Mass. 71; Boston v. Dist. of Columbia, 19 Ct. of Cl. (U. S.) 31; King v. Barber, 61 Iowa, 674; New York, &c., R. R. Co. v. Sanders, 134 Mass. 53; Tascott v. Grace, 12 Ill. App. 639; Davis v. Davis, 85 Ind. 157; Hauck v. Hauck, 99 Penn. St. 552; Miller's Appeal, 100 id. 568; Greenwell v. Greenwell, 28 Kan. 675; Hurst v. Hite, 20 W. Va. 183; Hallowbush's Estate, 13 Phila. (Penn.) 217; Wood v. Brewer, 66 Ala. 570; Cincinnati, &c. R. R. Co. v. Lee, 37 Ohio St. 479; Taylor v. Wood, 4 Lea (Tenn.), 504.

If money is expended, services rendered, or property delivered to a person upon a contract which is void, or not legally enforceable because of some disability of the other contracting party, the law implies a contract to repay the money, or to pay for the services or goods what they are reasonably worth. Tucker v. Grover, 60 Wis. 240; Cohen v. Stein, 61 id. 508; Hyer v. Hyatt, 3 Cranch (U. S. C. C.) 276; Parsons v. Keyes, 43 Tex. 557; Ballard v. McKenna, 4 Rich. Eq. (S. C.) 358; Thurston v. Percival, 1 Pick. (Mass.) 415; Wheeler v. Ansonia Clock Co., 97 N. Y. 293. As, where a contract for services is entered into which is not enforceable because of the Statute of Frauds. Mills v. Joiner, 20 Fla. 479; McCrowell v. Burson, 79 Va. 296; Saib v. Campbell, 65 Wis. 405. Or where extra services are rendered at the request of an employer. Davis v. Ladue, 58 Mich. 226. Or where beneficial services are rendered and accepted by a person, but no contract therefor exists. Donovan v. Halsey Fire Engine Co., 58 Mich. 38; Farrell v. Dooley, 17 Ill. App. 66; McKee v. Vincent, 33 Minn. 508. And generally, without stopping to particularize, where a person has accepted benefits from another, under circumstances which warrant a presumption that they were not gratuitous, but were to be paid for, the law will imply a promise to pay their reasonable value. Thus, if a person sends his servant to a shop for goods, and nothing is said about the price or the pay for them, the law implies a promise on the master's part to pay therefor the price usually charged therefor by the shopkeeper. So if a person furnishes necessities to a wife the law implies a promise on the part of the husband to pay therefor. Eiler v. Crull, 99 Ind. 375. And the same rule prevails as to necessities furnished to infants: Gay v.

Ballou, 4 Wend. (N. Y.) 403; *Parsons v. Keys*, 43 Tex. 557; or to insane persons: *Williams v. Wentworth*, 5 Beav. 325. So generally, where an absolute duty is imposed upon another, and he fails to perform it. Any person who stands in such a relation to the duty as to justify him in performing it, may perform it and recover therefor of the person upon whom the duty rests. As, against a husband for the expense of burying his wife who died during the husband's absence. *Jenkins v. Tucker*, H. Bl. 90; *Samuel v. Thomas*, 51 Wis. 549; *In re Miller*, 4 Redf. (N. Y. Surr.) 302; *Luscomb v. Ballard*, 5 Gray (Mass.), 403. Where a person compels another to perform services for him, the law implies a promise to pay therefor. *Cook v. Husted*, 12 Johns. (N. Y.) 188; *Peter v. Steel*, 3 Yeates (Penn.), 250. But where the circumstances are such as to show that the benefit was gratuitously conferred, no promise to pay therefor can be implied. *Keiser v. State*, 82 Ind. 379; *Rockford, &c. R. R. Co. v. Sage*, 65 Ill. 328; *Whealey v. Peak*, 49 Mo. 80; *French v. Smith*, 58 N. H. 323; *Schnell v. Schroder*, Bailey Eq. (S. C.) 334; *Davenport v. Mason*, 15 Mass. 85; *Osier v. Hobbs*, 33 Ark. 215; *Safety Deposit Co. v. Smith*, 65 Ill. 309; *Sanborn v. Goodhue*, 34 N. H.; *Stowe v. Sawyer*, 4 Allen (Mass.), 515; *Deer Isle v. Eaton*, 12 Mass. 328; *Martin v. Quinn*, 37 Cal. 55; *Stark v. Thompson*, 37 B. Mon. (Ky.) 296; *Koontz v. Franklin*, 77 Penn. St. 154; *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Clow v. Boorst*, 6 Johns. (N. Y.) 37; *Daniels v. Hollenbeck*, 19 Wend. (N. Y.) 408; *Biddle v. Carraway*, 6 Jones Eq. (N. C.) 95; *Bremer v. Curtis*, 54 Iowa, 72; *Blanchard v. Association, &c.*, 59 Me. 202; *South Scituate v. Hanover*, 9 Gray (Mass.), 420; *Lewis v. Lewis*, 3 Strobb. (S. C.) 530; *Munroe v. Easton*, 2 Johns. Cas. (N. Y.) 75; *Aden v. Elliott*, 10 B. Mon. (Ky.) 313; *Richardson v. Williams*, 49 Me. 558; *Winsor v. Savage*, 9 Met. (Mass.) 346; *James v. O'Driscoll*, 2 Bay (S. C.), 101; *Watson v. Ledoux*, 8 La. An. 68; *White v. Jones*, 14 La. An. 681; *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28; *Daubspeck v. Powers*, 32 Ind. 42; *Hays v. McConnell*, 42 Ind. 285; *Mariner v. Collins*, 5 Harr. (Del.) 290; *Thorp v. Bateman*, 37 Mich. 68; *Smith v. Johnson*, 45 Iowa, 308; *Ryan v. Lynch*, 9 Mo. App. 18; *Keegan v. Malone*, 62 Iowa, 208; *Taylor v. Taylor*, 1 Lea (Tenn.), 83.

NOTE 10. **Contracts with agents.** — The rule is well settled that a principal is bound by the acts of his agent, within the scope of his *real or apparent* authority, and is entitled to all the benefits of such contracts. *Pennsylvania R. R. Co. v. Atha*, 20 Fed. Rep. 920; *Hawks v. Locke*, 139 Mass. 205; *Brett v. Bassett*, 63 Iowa, 340; *Lewis v. Farrell*, 51 Conn. 216; *National Furnace Co. v. Keystone Manuf. Co.*, 110 Ill. 427; *Myers v. Mutual Life Ins. Co.*, 99 N. Y. 1; *Coy v. Stiner*, 53 Mich. 42; *Phillips v. McGrath*, 62 Wis. 124; *Chetwood v. Berrian*, 39 N. J. Eq. 203; *Alabama &c. R. R. Co. v. Roebuck*, 76 Ala. 277; *Wolfe v. Pugh*, 101 Ind. 293; *Webster v. Wray*, 17 Neb. 579. If an agent takes a note payable to himself instead of the principal, it may be transferred by the principal: *Caldwell v. Meshue*, 44

Ark. 564; and belongs to him: *Robinson v. Anderson*, 106 Ind. 152. So a note signed by a person as agent may be enforced *against* the principal, if given for his benefit and within the scope of his authority. *Farmers', &c. Bank v. Colby*, 54 Cal. 352; *Bradstreet v. Baker*, 14 R. I. 546. Where an agent's acts are within the scope of his apparent authority, the principal cannot relieve himself from liability by proving that the agent's powers were limited by a special agreement. *Bryne v. Massasoit Packing Co.*, 137 Mass. 313; *Paine v. Tillinghast*, 52 Conn. 532; *Banks v. Everest*, 35 Kan. 687; *Mercier v. Copelan*, 73 Ga. 636. As soon as an agent has closed a contract for his principal, the latter's rights under the contract at once attach, and he may maintain an action thereon. *Odessa Bank v. Jennings*, 18 Mo. App. 861; *McBain v. Seligman*, 58 Mich. 294. Even an undisclosed principal may maintain an action on the contract, if the agent has no interest therein. *N. O. Ins. Co. v. Spruance*, 18 Ill. App. 576.

NOTE 11. **Undisclosed principals.** — The rule as stated in the text as to the rights of an undisclosed principal prevails in our courts. *Pitts v. Mower*, 18 Me. 361; *Farmers', &c. Bank v. King*, 57 Penn. St. 202; *Ford v. Williams*, 21 How. (U. S.) 287; *Woodruff v. McGehee*, 30 Ga. 158; *Taintor v. Pendergast*, 3 Hill (N. Y.), 72; *Gillett v. Ball*, 9 Penn. St. 13; *Jordan v. Sparkington*, 4 Dev. L. (N. C.) 357; *Caverly v. Brainard*, 28 Vt. 738; *Henry v. Marvin*, 3 E. D. S. (N. Y. C. P.) 71; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Merrill v. Bank of Norfolk*, 19 Pick. (Mass.) 32; *Barry v. Page*, 11 Gray (Mass.), 398; *N. Y. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 381; *Whitley v. Fay*, 6 Jones Eq. (N. C.) 34; *Frazier v. Erie Bank*, 8 W. & S (Penn.) 485. The contract of an agent is the contract of his principal, and the principal may sue or be sued thereon, although the contract is in writing and he is not named therein. The principal may show that the agent who made the contract in his own name was in fact acting for him, and this proof is held not to infringe the rule that parol evidence is not admissible to contradict a written contract. Such evidence does not deny that the contract is binding upon those whom upon its face it purports to bind; but shows that it also binds another. See *Erickson v. Compton*, 6 How. Pr. (N. Y.) 471; *Ruiz v. Norton*, 4 Cal. 355; *Oelrichs v. Ford*, 21 Md. 489; *Elkins v. Boston, &c. R. R. Co.*, 19 N. H. 337; *Ames v. St. Paul, &c. R. R. Co.*, 12 Minn. 413. And secret instructions given to him by the principal do not affect the rights of persons with whom the agent deals, unless they are charged with notice of them. *Bannell v. Briggs*, 45 Barb. (N. Y.) 470; *Perth Amboy Manuf. Co. v. Condit*, 21 N. J. L. 659; *Rathbone v. Sanders*, 9 Ind. 217. A principal claiming under a contract made by his agent is bound by all its terms. *Pellerin v. Dungan*, 2 La. An. 383; *Voegel v. New York*, 92 N. Y. 10. In the last case, it was held that where a contractor performs his work in such a manner that it becomes a nuisance, if the principal accepts it in that condition, he becomes liable for all the consequent and subsequent injury resulting therefrom.

NOTE 12. The rule is well settled that a principal is bound by the acts of his agent within the scope of his apparent authority, which includes all acts incidental to the act authorized. He is liable to third persons for the frauds, torts, and negligence of the agent in so far as they are incident to the authority conferred upon him, although he never, in fact, contemplated the doing of the particular act by the agent, and never consented to it. *Bennett v. Judson*, 21 N. Y. 238; *Milwaukee &c. R. R. Co. v. Finney*, 10 Wis. 388; *Johnson v. Barber*, 10 Ill. 425; *Hunter v. State*, 1 Head (Tenn.), 110; *Bank v. Gregg*, 14 N. H. 331; *Condit v. Baldwin*, 21 N. Y. 219. But this rule must be understood as applying only *when the agent acts strictly within the scope of his authority*. *Smith v. Tracy*, 21 N. Y. 79.

When a person clothes another with authority to speak and act for him, and holds him out to third persons as entitled to trust and confidence, the law very justly holds the principal responsible to those who have been misled by his falsehood and fraud relative to the particular matter in reference to which the agent was authorized to act. But if the fraud of the agent is foreign to the transaction in which he was employed, the principal is not responsible therefor, unless, knowing the facts, he has ratified the agent's acts. *Echols v. Dodd*, 20 Tex. 190; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Haack v. Fearing*, 5 Robt. (N. Y. Superior Ct.) 528.

An agent who signs his own name instead of that of his principal, when he intends to bind the latter, becomes himself liable if the person with whom he dealt was not aware of the fact that he was acting in that transaction as agent for a known principal. And the word "agent" appended to his name is merely *descriptio personæ*. *Sayre v. Nichols*, 5 Cal. 487; *Hall v. Cockrell*, 28 Ala. 507; *Andrews v. Allen*, 4 Harr. (Del.) 452; *Bickford v. First, &c. Bank*, 42 Ill. 238; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *Wiley v. Shank*, 4 id. 420; *Crum v. Boyd*, 9 Ind. 289; *Scott v. Messick*, 4 T. B. Mon. (Ky.) 535; *McBean v. Morrison*, 1 A. K. Mar. (Ky.) 545; *Megent v. Hickey*, 2 La. An. 358; *Forster v. Fuller*, 6 Mass. 58; *Thacher v. Dinsmore*, 5 id. 299; *Sumner v. Williams*, 8 id. 162; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Hastings v. Lovering*, 2 id. 214; *Stackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, id. 54; *Arfridson v. Ladd*, 12 id. 173; *Seaver v. Coburn*, 10 Cush. (Mass.) 324; *Bass v. Randall*, 1 Minn. 404; *Rollins v. Phelps*, 5 id. 463; *Bingham v. Stewart*, 13 id. 106; *Pratt v. Beaupre*, id. 187; *Holmes v. Carman*, 1 Freem. Ch. (Miss.) 408; *Chouteau v. Paul*, 8 Mo. 260; *Sheldon v. Dunlap*, 16 N. J. L. (1 Harr.) 245; *Stone v. Wood*, 7 Cow. (N. Y.) 453; *Bank of Rochester v. Monteath*, 1 Den. (N. Y.) 402; *Cabre v. Sturges*, 1 Hilt. (N. Y.) 160; *Blakeman v. Mackay*, id. 266; *Collins v. Buckeye Ins. Co.*, 17 Ohio St. 215; *Fash v. Ross*, 2 Hill (S. C.), 294; *Hodges v. Green*, 28 Vt. 358. The rule is well established that an agent who does not disclose his agency will be held as principal. *Merrill v. Wilson*, 6 Ind. 426; *Wheeler*

v. Reed, 36 Ill. 81; *Pierce v. Johnson*, 34 Conn. 274; *Mithoff v. Byrne*, 20 La. An. 363; *McClellan v. Parker*, 27 Mo. 162; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Forney v. Shipp*, 4 Jones L. (N. C.) 527; *Meyer v. Barker*, 6 Binn. (Pa.) 228; *Davenport v. O'Hear*, 2 McCord (S. C.), 198; *Conyers v. McGrath*, 4 id. 392; *Bacon v. Londley*, 3 Strobb. (S. C.) 542; *Royce v. Allen*, 28 Vt. 234; *Baldwin v. Leonard*, 39 id. 260. And the legal presumption that a party binds himself by a contract, and does not act as agent, should turn the scale in an evenly balanced case. *Curts v. Scoles*, 1 Iowa. 471.

And in all cases where a person makes a contract in the name of another without authority, he may be held liable upon the contract, if there are apt words to charge him. But if there are not, he is liable for the deceit, in an action on the case. *Taylor v. Shelton*, 30 Conn. 122; *Ballou v. Talbot*, 16 Mass. 461; *Long v. Colburn*, 11 id. 97. But see *Hatch v. Smith*, 5 id. 42, 52; *Byars v. Doores*, 20 Mo. 284; *Coffman v. Harrison*, 24 id. 524; *Savage v. Rix*, 9 N. H. 263; *Bank of Hamburg v. Wray*, 4 Strobb. (S. C.) 87; *Clark v. Foster*, 8 Vt. 98.

NOTE 13. The rule is that, where an agent does any act of which the principal enjoys the benefit or accepts the fruits, the latter is estopped from saying that the act was illegal. *Reid v. Hibbard*, 6 Wis. 175; *Hastings v. Bangor House*, 18 Me. 436; *Low v. Conn. River, &c. R. R. Co.*, 46 N. H. 175; *Taylor v. Agricultural, &c. Ass'n*, 68 Ala. 229. But if he did not know the facts he may, upon their discovery, restore the party to his former condition and repudiate the act. *Roberts v. Rumley*, 58 Iowa, 301. But having once elected, he is estopped thereby. *Andrews v. Ætna Ins. Co.*, 92 N. Y. 596.

By his acts he has ratified and adopted the agent's acts, and they thereby become as binding upon him as though they had been done by himself; and the legal effect is precisely equivalent to a previous delegation of authority. *Despatch, &c. Co. v. Bellamy*, 12 N. H. 205; *Courcier v. Ritter*, 4 Wash. (U. S.) 549; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *Den v. Wright, Pet.* (U. S. C. C.) 64; *Workman v. Cuthrie*, 20 Penn. St. 495; *Towle v. Stephenson*, 1 Johns. Cas. (N. Y.) 110; *Brock v. Jones*, 16 Tex. 461; *Cox v. Robinson*, 2 S. & P. (Ala.) 91; *Weisiger v. Wheeler*, 14 Wis. 101; *Van Horne v. Frick, C. S. & R.* (Penn.) 90; *Brown v. La Crosse City, &c. Co.*, 21 Wis. 51; *Fisher v. Willard*, 13 Mass. 379; *Andrews v. Ætna Ins. Co.*, 92 N. Y. 596; *Jones v. Atkinson*, 68 Ala. 167; *Pollok v. Gratt*, 69 Ala. 373; *McGeagh v. Hooker*, 11 Ill. App. 649; *Irons v. Reyburn*, 11 Ark. 378; *McGowen v. Garrard*, 2 Stew. (Ala.) 479; *Clark v. Van Riensdyck*, 9 Cranch, 153; *Reynolds v. Dothard*, 11 Ala. 531; *Lee v. Fontaine*, 10 Ala. 755; *Perry v. Hudson*, 10 Ga. 362; *Goodell v. Woodruff*, 20 Ill. 191; *Ohio, &c. R. R. Co. v. Middleton*, 20 Ill. 629; *Bell v. Ryerson*, 11 Iowa, 233; *Coffin v. Gephart*, 18 Iowa, 256; *Barbour v. Craig*, 6 Litt. (Ky.) 213; *Bloodworth*

v. Jacobs, 2 La. An. 24; *Dunbar v. Bullard*, id. 810; *Overby v. Overby*, 18 id. 546; *Meyers v. Simmons*, 19 id. 370; *Cowan v. Wheeler*, 31 Me. 439; *Forsyth v. Day*, 46 id. 176; *Williams v. Mitchell*, 17 Mass. 98; *Loury v. Harris*, 12 Minn. 255; *Baker v. Byrne*, 10 Miss. (2 Sued. & M.) 193; *Kountz v. Price*, 40 Miss. 341; *Ruggles v. Washington County*, 3 Mo. 496; *Little v. Stillreimer*, 13 Mo. 372.

But, as the doctrine of estoppel does not apply, except where a party knows the facts, or ought to have known them, it follows that a principal cannot be estopped from denying the agent's authority where the principal received the fruits of the agent's acts without knowing that he had acted beyond his authority. *Dean v. Bassett*, 57 Cal. 640; *Owsley v. Phillips*, 78 Ky. 517. But upon learning the facts he must offer to put the party *in statu quo*, or repudiate the act; and he must act promptly, or he will be treated as having ratified the act. *Hunt v. Dixon*, 5 Lea (Tenn.), 336. And bringing a suit to enforce a contract made by an agent is treated as a ratification. *Benson v. Liggett*, 78 Ind. 452; *Hauss v. Niblack*, 80 Ind. 407; *Beidman v. Goodell*, 56 Iowa, 592.

NOTE 14. Contracts with Infants, validity and binding force of, Affirmance of, &c. A contract made by an infant *for necessities*, when absent from home, and not under the care of his parents or guardian is valid and binding upon him. But if at home, under the care of and supported by his parents, he is not liable even for necessities. *Elrod v. Myers*, 2 Head (Tenn.), 83; *Angel v. M'Lellan*, 16 Mass. 28; *Jones v. Colvin*, 1 McMull. (S. C.) 14; *Perrin v. Wilson*, 10 Mo. 451; *Connelly v. Hull*, 3 McCord (S. C.), 6; *Walling v. Toll*, 9 Johns. (N. Y.) 141; *Kline v. Lamenoux*, 2 Paige Ch. (N. Y.) 419; *Hyman v. Cain*, 3 Jones L. (N. C.) 111; *Johnson v. Lines*, 6 W. & S. (Penn.) 80; *Kraker v. Byran*, 13 Rich. L. (S. C.) 163; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *Trainer v. Trumbull*, 141 Mass. 527. Even for necessities he is not liable upon the contract, but only for their reasonable value. *Bonchell v. Clary*, 3 Brev. (S. C.) 194; *Hyer v. Hyatt*, 8 Cranch (U. S. C. C.), 276; *Passenger R. R. Co. v. Stutler*, 54 Penn. St. 375.

As to what are necessities, depends upon the circumstances of each case, but *necessary* food, lodging, and clothes clearly come under that head. As to other matters, the question is to be determined in view of the facts. In *Munson v. Washband*, 31 Conn. 303, a female infant was seduced and got with child under a promise of marriage. The seducer afterwards refused to marry her, and she was left in a state of destitution and suffering. In these circumstances she applied to an attorney to bring suit for her for the breach of the promise of marriage, the seducer being a man of considerable property. The attorney brought the suit, which was afterwards settled by the marriage of the parties. After the marriage the attorney sued the husband and wife for his fees. The court charged the jury that if the services were absolutely requisite for

the personal relief, protection, and support of the minor, she could contract for them, and the defendants were liable. It was held on motion of the defendants for a new trial, that the charge was correct. It was also held in this case, that in cases where, under peculiar circumstances, a civil suit is the only means by which an infant can procure the absolute necessities which he requires, it would be a reproach to the law to deny him the power to make the necessary contracts for its commencement and prosecution.

The court say "There is no reason why the power of an infant to contract for necessities should not be governed by the same general principles which determine the power of a married woman, abandoned by her husband, to procure necessities; and it is well settled that her power extends to legal proceedings necessary to her personal security."

As to what are regarded as necessities, see *Freeman v. Bridger*, 4 Jones L. (N. C.) 1; *Glover v. Ott*, 1 McCord (S. C.), 572; *Rainwater v. Durham*, 2 Nott & M. (S. C.) 524; *Aaron v. Harley*, 6 Rich. (S. C.) 26; *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Middlebury College v. Chandler*, 16 Vt. 683; *Bradley v. Pratt*, 23 Vt. 378; *Thrall v. Wright*, 38 Vt. 494; *Beeler v. Young*, 1 Bibb (Ky.), 519; *Sams v. Stockton*, 14 B. Mon. (Ky.) 232; *Perkins v. Bailey*, 6 La. An. 256; *Levering v. Heighe*, 2 Md. Ch. 81; *Tupper v. Cadwell*, 12 Met. (Mass.) 559; *Mason v. Wright*, 13 id. 306; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Davis v. Cadwell*, 12 id. 512; *N. H. M. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Atchison v. Bruff*, 50 Barb. (N. Y.) 38. In *Hall v. Butterfield*, 59 N. H., STANLEY, J., carefully considered the rights and liabilities of infants.

The right of infants, lunatics, persons *non compos mentis*, and drunkards, when in such a state as to be entirely deprived of reason, to avoid their contracts, is placed on the same ground. They are considered to be devoid of that freedom of will, combined with maturity of reason and judgment, essential to enable them to give the assent necessary to make a valid contract. To protect them from fraud and imposition, to which from their want of understanding and immaturity of judgment they are exposed, they are permitted to allege their want of capacity to bind themselves by contract. But this privilege is to be used as a shield, not as a sword; not to do injustice, but to prevent it. *Zouch v. Parsons*, 3 Burr. 1794; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Allis v. Billings*, 6 Met. (Mass.) 415; *Hallett v. Oates*, 1 Cush. (Mass.) 296; *Taft v. Pike*, 14 Vt. 405; *Lincoln v. Buckmaster*, 32 id. 652; *Matter of Barker*, 2 Johns. Ch. (N. Y.) 233; *Sanford v. Sanford*, 62 N. Y. 553, 557; *Squier v. Hydliiff*, 9 Mich. 274; *Spicer v. Earl*, 41 id. 191; *Allen v. Berryhill*, 27 Iowa, 540.

It was formerly held that the contracts of lunatics and persons *non compos mentis* were absolutely void. *Thompson v. Leach*, 3 Mod. 301; *Gore v. Gibson*, 13 Mee. & W. 623; *Chit. Cont.* 24, 139. But this has been seriously questioned, and it is now held that they are voidable only: *Wait v. Maxwell*, 5 Pick. (Mass.) 217; *Allis v. Billings*, 6 Met. (Mass.)

415; *Ingraham v. Baldwin*, 9 N. Y. 45; and that where a contract is entered into in good faith with a lunatic or a person *non compos mentis*, and is for the benefit of such person, courts of law as well as equity will uphold it. *McCrillas v. Bartlett*, 8 N. H. 569; *Young v. Stevens*, 48 id. 133; *Mut. Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Hallett v. Oates*, 1 Cush. (Mass.) 296. Where goods have been supplied to a party which were necessities, or were suitable to his or her station or employment in life, and which were furnished under circumstances evincing that no advantage of his or her mental infirmity was attempted to be taken, and which have been enjoyed by such party, then he or she is liable at law, as well as in equity, for the value of the goods. *Kendall v. May*, 10 Allen (Mass.), 62.

The privilege accorded to infants to avoid their contracts rests on the same ground as that accorded to lunatics and persons *non compos mentis*, — protection against fraud, to which by reason of their immaturity of judgment they are liable. So far as relates to their contracts, these different classes of persons are said to be parallel, both in law and reason. *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Breckenridge v. Ormsby*, 1 J. J. Mar. (Ky.) 236.

Until the decision in *Zouch v. Parsons*, 3 Burr. 1794, none of the contracts of minors were enforceable. They were all either void or voidable. *Bac. Abr. Infant I*, 3; *Com. Dig. Infant B*, 5; *Lloyde v. Gregory*, Cro. Car. 502. But in *Zouch v. Parsons*, *ante*, it was held that infants were liable on their contracts for necessities on the ground of necessity, and because they were of benefit to the infant. Lord MANSFIELD said, page 1801: "Great inconveniences must arise to others if infants were bound by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their benefit. . . . A third rule deducible from the nature of the privilege that is given as a shield and not as a sword, is, that it never shall be turned into an offensive weapon of fraud or injustice. . . . The end of the privilege is to protect infants. To that object therefore, all the rules and their exceptions must be directed." In *Drury v. Drury*, cited in *Maddon White*, 2 T. R. 159, Lord MANSFIELD laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him; and BULLER, J., said Lord HARDWICKE afterward adopted this rule. But this broad principle announced by Lord MANSFIELD, and which seems so just and wise, and which secures to infants all the protection necessary to save them from the consequences of immaturity of judgment and understanding, has been limited so that under it they have only been held liable upon an implied contract for necessities, such as necessary meat, drink, apparel, medicine, and instruction, and if married, provision for wife and children. Recently the term has been extended to include counsel fees, in cases involving their liberty. *Barker v. Hibbard*, 54 N. H. 539;

McCrillas v. Bartlett, 8 id. 569. Formerly it was held by some authorities that they could not be allowed to rescind their contracts in regard to either personal or real property until after coming of age; but this has been modified so that as to their contracts in regard to their personal property, they may rescind as well before as after. *Carr v. Clough*, 26 N. H. 289, 291; *Roof v. Stafford*, 7 Cow. (N. Y.) 179; *Stafford v. Roof*, 9 id. 626. So they were formerly allowed to rescind, and recover what they had paid on their contracts, without restoring what they had received. But this has been changed, and it is now held that they cannot rescind without restoring or offering to restore the consideration, if remaining in *specie* and in the possession or control of the infant and capable of return; and in some jurisdictions it is now held that where the consideration cannot be restored, the infant, before he can be allowed to rescind, must place the adult in as good condition as though he had returned the consideration, or he must account for the value of it. *Carr v. Clough*, *ante*; *Heath v. West*, 28 N. H. 101, 110; *Locke v. Smith*, 41 id. 346, 353; *Young v. Stevens*, 48 id. 133, 137; *Heath v. Stevens*, id. 251; *Kimball v. Bruce*, 58 id. 327; *Price v. Furman*, 27 Vt. 268; *Badger v. Phinney*, 15 Mass. 359; *Riley v. Mallory*, 33 Conn. 201. This is especially the case in contracts for services, where the infant seeks to avoid his contract and recover what his services are reasonably worth; and this allows the adult to set off against the value of the plaintiff's services the reasonable value of what the infant has received on account of such services; or in other words, the infant is entitled to recover for the benefit which the adult has derived from the services performed by him. *Lufkin v. Mayall*, 25 N. H. 82; *Locke v. Smith*, *ante*; *McCrillis v. How*, 3 N. H. 348; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Stone v. Dennison*, 13 id. 1; *Breed v. Judd*, 1 Gray (Mass.), 455; *Gaffney v. Hayden*, 110 Mass. 137; *Hoxie v. Lincoln*, 25 Vt. 206; *Harney v. Owen*, 4 Blackf. 337; *Squier v. Hydliff*, 9 Mich. 274; *Spicer v. Earl*, 41 id. 191; *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375.

Infants were formerly held liable on their contracts for necessities; but it is now held that they are liable, *not by virtue of any contract, but on the ground of an implied legal liability based on the necessity of the situation.*

It is apparent that the tendency of the later decisions is to enlarge the liabilities and obligations of infants; and while the liability has not in their case been extended so far as it has in regard to lunatics and persons *non compos mentis*, the principle on which it rests is the same. The grants of infants and persons *non compos* are parallel, both in law and reason. *Thompson v. Leach*, 3 Mod. 301; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Breckenridge v. Ormsby*, *supra*. In view of these facts, no reason appears why the wise and just principle enunciated by Lord MANSFIELD should not be given its full force, and the rights and obligations of lunatics, persons *non compos mentis*, drunkards when in such a state as to

be entirely bereft of reason, and infants, be placed on the same ground. The obligation to account only for the benefit actually received secures ample protection from fraud and imposition, and at the same time prevents the privilege from being used to perpetrate fraud. It prevents their disability from being "not their protection merely, but an extraordinary legal ability to rob others; not a shield, but a sword; not a mere legal incapacity to be plundered by their fellow-men, but a vast capacity to plunder them with impunity."

The right to recover for necessities is given, because the infant has derived a benefit therefrom. It is upon no other ground. If the benefit is the foundation of the right, why should it be limited to necessities? It cannot be said that the infant, if engaged in trade or business, may not derive a benefit therefrom. If benefit obtained by the infant is the test in one case, why not make it the test in all cases? This has been made the test in the case of lunatics and persons *non compos mentis*, and it should be applied in the case of infants. The true rule is that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract. The question whether the infant has received a benefit, like the question of what are necessities, and what sum the infant ought to pay for them, or the question of negligence, or ordinary care, and other similar questions, is one of mixed law and fact. No uniform rule can be established. A contract which, under some circumstances to one person might be beneficial, under others and to another might be injurious. In no two cases are we likely to find the same facts; and it must always be for the trier to apply the law to the facts, and determine whether the infant has been benefited, and to what extent.

It is now generally held that an infant's contracts, or deeds even, are not void, unless manifestly to their prejudice, but are voidable only. *Slaughter v. Cunningham*, 24 Ala. 260; *Green v. Wilding*, 59 Iowa, 679; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Weaver v. Jones*, 24 Ala. 420; *Parsons v. Hill*, 8 Mo. 135; *Chapman v. Chapman*, 13 Ind. 396; *Jenkins v. Jenkins*, 12 Iowa, 195; *Lowe v. Girt*, 5 H. & J. (Md.) 106; *Welborn v. Rogers*, 24 Ga. 558; *State v. Plaisted*, 43 N. H. 413; *Adams v. Ross*, 30 N. J. L. 505; *Ridgely v. Crandall*, 4 Md. 435; *Harrod v. Myers*, 21 Ark. 592; *Johnson v. Rockwell*, 12 Ind. 76; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Cummings v. Powell*, 8 Tex. 80; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Gillett v. Stanley*, 1 Hill (N. Y.), 121; *Ferguson v. Bell*, 17 Mo. 347; *Cook v. Toombs*, 36 Miss. 685; *White v. Flora*, 2 Overt. (Tenn.) 426. As, leases: *Baxter v. Bush*, 29 Vt. 495; *Griffith v. Schemerhorn*, 27 Mo. 412; releases: *M'Lellan v. Kennedy*, 8 Md. 230; mortgages: *Roberts v. Wiggin*, 1 N. H. 73; *Heath v. West*,

28 N. H. 101; and promissory notes: *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Young v. Bell*, 1 Cranch (U. S. C. C.), 342; *Earle v. Reed*, 10 Met. (Mass.) 382; *Wright v. Steele*, 2 N. H. 51; *Buzzell v. Bennett*, 2 Cal. 101; *Handy v. Waters*, 38 Me. 450. But actions cannot be maintained against an infant upon such instruments during his minority. *McCrillis v. How*, 3 N. H. 348; *McWinn v. Richmond*, 6 Yerg. (Tenn.) 9; but if a note is given for necessities, according to the last cited cases, an action may be maintained for the necessities.

The contract or obligation of an infant may be affirmed by him and made obligatory upon his becoming of age, and such ratification may be either express or implied. *Forsyth v. Hastings*, 27 Vt. 646; *Farr v. Sumner*, 12 Vt. 28; *Henry v. Root*, 33 N. Y. 526; *Lawson v. Lovejoy*, 8 Me. 405; *Vaughn v. Parr*, 20 Ark. 600; *Alexander v. Heriot*, 1 Bailey Eq. (S. C.) 228; *Aldrich v. Grimes*, 10 N. H. 194; *N. H. Mutual F. Ins. Co. v. Noyes*, 32 N. H. 345; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Wells v. Seixas*, 20 Fed. Rep. 82.

But the affirmance must be by such decisive act, or such a course of conduct as excludes the idea that he intended to avoid the contract. *Emmons v. Murray*, 16 N. H. 385; *Summers v. Wilson*, 2 Cold. (Tenn.) 469; *Conklin v. Ogburn*, 7 Ind. 553; *Cheshire v. Barrett*, 4 McCord (S. C.), 241; *Little v. Duncan*, 9 Rich. L. (S. C.) 55.

A mere acknowledgment of the debt after attaining majority does not amount to an affirmance; there must be a direct promise or a direct confirmation. *Hale v. Gerrish*, 8 N. H. 374; *Bank v. Browning*, 16 Abb. Pr. (N. Y.) 272.

In Maine, by statute, the ratification must be in writing, and in some of the States, by statute, the infant is required to disaffirm, upon attaining majority, so that in all cases the statute should be regarded under this head.

Where a defendant, in conversation concerning a note made by him during infancy, said he owed the plaintiff, but was unable to pay him, and that he would endeavor to procure his brother to be bound with him, it was held not to be a renewal of the promise. *Ford v. Phillips*, 1 Pick. (Mass.) 202. So where an infant bought goods that were not necessities, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ, and the goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale, it was held that there was not a ratification of the contract of sale by the defendant, and that the action could not be maintained. *Smith v. Kelley*, 13 Met. (Mass.) 309.

Mere declarations, or a promise *upon a contingency* to make a deed of affirmance, will not ratify and confirm the deed of an infant. *Clamorgan v. Lane*, 9 Mo. 446. Nor does a new promise by an infant, after coming

of age, and after the commencement of the action, operate as a ratification of the debt. *Merriam v. Wilkins*, 6 N. H. 432; *Thing v. Libbey*, 16 Me. 55; *Turner v. Gaither*, 83 N. C. 357.

A person who gave a note during his infancy, after he became of age made declarations of an intention of payment, to persons having no interest in or agency as to the note. It was held that this was no evidence of a promise of payment, or ratification of the contract. *Hoit v. Underhill*, 9 N. H. 436; *Bigelow v. Grannies*, 2 Hill (N. Y.), 120. So it was held that a conveyance of real estate by an infant is not ratified by mere recognition or acquiescence in it for any period less than the period of statutory limitation. *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150.

A neglect or forbearance by a person, for fourteen years, to bring an action to disaffirm a sale of land, made during minority, is not an affirmation of the title. *Urban v. Grimes*, 2 Grant Cas. (Penn.) 96.

An infant contracted a debt, which, after he had attained majority, he promised to pay "as fast as he got able." It was held that this promise availed nothing without proof of ability to pay. *Chandler v. Glover*, 32 Penn. St. 509.

If he has any part of the consideration of the contract in his possession when he attains majority, he must return it before he can disaffirm the contract; but if he has lost or squandered it during minority he is not obliged to return anything. *Brantley v. Wolf*, 60 Miss. 420; *Dawson v. Helmes*, 30 Minn. 107; *Miller v. Smith*, 26 Minn. 248; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Mass. 396; *Manning v. Johnson*, 26 Ala. 446; *Philpot v. Sandwich Manuf. Co.* 18 Neb. 54. In order to be operative, an affirmance need not be made with knowledge that the infant is not liable for the obligation. *Morse v. Wheeler*, 4 Allen (Mass.), 570. But it must be voluntary: *Ford v. Phillips*, 1 Pick. (Mass.) 202; and must be made before the action is commenced. *Ford v. Phillips*, *ante*. Bringing an action is a disaffirmance. *St. Louis Iron, &c. R. R. Co. v. Higgins*, 44 Ark. 293. So, conveying the property to another person. *Bayley v. Fletcher*, 44 Ark. 153; *Haynes v. Bennett*, 53 Mich. 15; *Sims v. Smith*, 99 Ind. 469. But a warrantee deed executed by him after attaining majority does not disaffirm a mortgage given by him before he came of age: *Hawes v. Burlington, &c. R. R. Co.*, 64 Iowa, 315; *Singer Manuf. Co. v. Lamb*, 81 Mo. 221; unless the mortgage is referred to in the deed. *Losey v. Bond*, 94 Ind. 67.

The fact that a person dealing with an infant does not know that he is a minor, does not estop the infant from setting up his infancy to defeat the contract. *Baker v. Stone*, 136 Mass. 405.

A promise by a person of full age to pay a debt contracted by him while an infant, operates as an affirmance of it. *Anderson v. Saward*, 40 Ohio St. 325. An infant cannot affirm a contract before he becomes of age; but he can rescind it. Thus where an infant purchased a horse

and gave his note therefor, it was held that he might rescind the contract by returning the horse and demanding the note. *Hoyt v. Wilkinson*, 57 Vt. 404. Where an infant, having bought a carriage upon instalments, after having paid several instalments thereon offered to return the vehicle, and demanded his money back, it was held that he could recover the money without any deduction for the use of the vehicle. The rule is, that if an infant has purchased property and paid the consideration therefor, he may return the property and recover back the money paid, he being invested with the right to elect whether he will or not be bound by the contract. *Cooper v. Allport*, 10 Daly (N. Y. C. P.), 352.

NOTE 15. Leases from Year to Year.—A tenancy from year to year is created either by special contract or by operation of law, and may be created by parol. *Wood's Landlord and Tenant*, 63; *People v. Rickert*, 8 Cow. (N. Y.) 226; *Strong v. Crosby*, 21 Conn. 398; *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100. Strictly speaking, this species of tenancy is the offspring of a tenancy at will, and was created to protect tenants from the arbitrary determination of their estates, after their crops were sown, and before their maturity.

The tenant is substantially a tenant at will, except that he is not, like a tenant at will, liable to be summarily ejected; but is entitled to six months' notice to quit. *Goddard v. R. R. Co.*, 2 Rich. (S. C.) 346; *Murray v. Armstrong*, 11 Miss. 209; *Darrell v. Johnson*, 17 Pick. (Mass.) 263; *Den v. Drake*, 14 N. J. L. 523; *Hall v. Myers*, 43 Md. 581; *Murray v. Armstrong*, 11 Miss. 209; *Hamitt v. Lawrence*, 2 J. J. Mar. (Ky.) 366; *Grant v. White*, 42 Mo. 285. Except in those States where a contrary condition exists by reason of a statute.

A tenant for a year, holding over after the expiration of his term, becomes a tenant from year to year or a trespasser, at the election of the landlord. *Hemphill v. Flynn*, 2 Penn. St. 144.

In the absence of words limiting or defining the nature of a tenancy, the main test as to whether a tenancy from year to year exists or not, is, whether or not there is a reservation of an annual rent or payment, or an agreement to pay rent for an aliquot part of a year, as monthly, quarterly, or semi-annually, so that it can be presumed that the parties intended to create such a tenancy. *Ridgeley v. Stillwell*, 25 Mo. 570; *Rich v. Bolton*, 40 Vt. 84. A mere permission to occupy for an indefinite period, no rent being reserved, does not create this species of tenancy. *Williams v. Deriar*, 31 Mo. 13; *Johnson v. Johnson*, 13 R. I. 467; *Sallabach v. Marsh*, 34 La. An. 1053. But if a weekly or monthly rent is reserved, a tenancy from year to year is implied: *Ridgeley v. Stillwell*, 25 Mo. 570; *Withrell v. Petzold*, 17 Mo. App. 669; as from this fact it is presumed that it is a monthly rent with reference to a yearly holding. *Lloyd v. Cozzens*, Ashm. (Penn.) 181. But even though there is a reservation of an annual rent, yet if the term is indefinite, as, if it is deter-

minable at any time at the election of the lessee, or if it is determinable before a certain time, a tenancy from year to year does not arise. *Stedman v. McIntosh*, 4 Ired. L. (N. C.) 291.

It is not essential that there should be an agreement to pay in money; but if the rent is fixed at a certain sum for the year, although the lease is upon condition that the tenant may occupy at such yearly rent until he has reimbursed himself for repairs made upon the premises, yet it has been held that a tenancy from year to year is created, because the *two* elements, annual rent and indefiniteness of term, concur. *Thomas v. Wright*, 9 S. & R. (Penn.) 87. In a Vermont case (*Hanchett v. Whitney*, 2 Aik. (Vt.) 240), the defendant went into possession of his father's farm, upon condition that he should support his father. The father became dissatisfied and moved away, and sold the farm to the plaintiff, who brought ejectment to recover possession without giving six months' previous notice to quit. The court held that the son was a tenant from year to year, and could not be ejected except at the end of a current year, and then only by six months' previous notice to quit. In a Maryland case, A. conveyed to B. certain tracts of land and personal property, to be held by B. "in trust for the use of A. during his life; and after his death in trust for his daughter C. and her four children, share and share alike, as tenants in common." Upon the death of A. the trustee went into full possession of the whole property, and soon after requested C. to take possession of the farm, agreeing with her, at the time, that she and her children should eat and wear, each, her and his fifth part of the proceeds of the property under the deed of trust; reserving to himself, B., the right at all times to manage and control all the trust property by himself and agents. Under these circumstances C., with her children, went upon a farm, part of the trust property. It was held that the right of management reserved to B. was to be exercised during C.'s possession; that it did not authorize him to dispossess her at pleasure, nor depute others to do it; but was a mere right of supervision and general direction as to the course of cultivation and general conduct of the property; that the legal effect of the agreement was not to create a tenancy at will, but a tenancy from year to year on that part of the premises only which was secured to the children by the deed, leaving C. to the full enjoyment of her absolute right of property in her fifth part of the estate. *Hall v. Hall*, 6 G. & J. (Md.) 386. A lease for no definite time, with an annual rent payable quarterly, is a lease from year to year, and cannot be terminated except at the close of the year, by previous notice to quit of the duration required by statute, or in the absence of any statutory regulation upon that subject, by the common law; and if the tenant commences a new year without having had notice to quit from the landlord, he cannot be turned out until the next year; but he must pay his rent quarterly, as provided in the lease, and perform all the other conditions contained therein. *Lesley v. Randolph*, 4 Rawle (Penn.), 123.

Although there has been no lease or agreement at all, if an annual rent has been paid for several years, a tenancy from year to year is thereby raised. *Hall v. Wadsworth*, 28 Vt. 410; *Hunt v. Morton*, 18 Ill. 75. There must be a payment of rent *as rent*. If the party enters under an agreement to purchase, and pays down a certain sum, which it is agreed shall be considered as a year's rent, in case he fails to perform, and failing to perform he holds over into another year, he is not a tenant from year to year, because there can be no presumption raised from these facts, that the amount of the advance sum paid by him was paid *as rent*, or that it was fixed with any reference to the actual rental value of the premises, and consequently that the person holding over held over at that rental. *Williamson v. Paxton*, 18 Gratt. (Va.) 475. And, even though such a presumption could be raised from the circumstances, yet, in this as in all other cases of a tenant holding over by the permission of the landlord, it may be rebutted by showing that the holding was not in the character of tenant, or that it was for some other purpose. *Williamson v. Paxton, ante*. If a tenant is expressly informed by the landlord that if he holds over it must be as a tenant from month to month and not for a year, no contract to the contrary can be implied. *Shipman v. Mitchell*, 64 Tex. 174. Nor is a demand for rent, made by the landlord, conclusive evidence of such consent as to convert the tenancy into one from year to year. *Condon v. Barr*, 47 N. J. L. 113. A parol lease for three or more years may be converted into a tenancy from year to year by payment of the rent annually or by the agreement of the parties. *Dunn v. Rothermel*, 112 Penn. St. 272.

A distinct understanding of the parties as to the nature of the tenancy overcomes the presumption arising from the payment of an annual rent. *Waring v. Louisville, &c. R. R. Co.* 19 Fed. Rep. 863.

A person who enters into possession under a void lease, or an agreement for a lease void under the Statute of Frauds, is but a mere tenant at will, but upon payment of rent he at once becomes a tenant from year to year upon the terms of the intended lease, so far as they are applicable and not inconsistent with a yearly tenancy. *Porter v. Blierly*, 17 Barb. (N. Y.) 149; *Lounsbury v. Snyder*, 31 N. Y. 514; *Thomas v. Nelson*, 5 id. 118; *Gaston v. Smith*, 38 id. 245; *Barlow v. Wainwright*, 22 Vt. 88; *Thurber v. Dwyer*, 10 R. I. 355.

The rule is that a person entering under such a lease, void for any cause, who pays or agrees to pay any part of the yearly rent reserved therein, becomes a tenant from year to year, subject to all the covenants and conditions of the lease applicable to such a tenancy, except as to its duration, and at the end of the void term the tenancy ceases without any notice to quit, by efflux of time, or it may be previously ended by notice to quit at the end of any year, or by an entry of the landlord for a forfeiture. *Strong v. Crosby*, 21 Conn. 398; *Thurber v. Dwyer*, 10 R. I. 355. In *Schuyler v. Leggett*, 4 Cow. (N. Y.) 60, a parol demise was made for

seven years which was void under the Statute of Frauds, but the tenant having entered into possession and paid rent under it, it was held that it inured as a tenancy from year to year, and that it regulated the terms of the occupancy in all other respects except the term of the tenancy, such as the amount of rent to be paid, the time of the year when the tenant must quit, &c. See also *People v. Rickert*, 8 Cow. (N. Y.) 226. In New York a tenancy at will is treated as a tenancy from year to year, *so far as is necessary* for the purpose of a notice to eject. *Bradley v. Covel*, 4 Cow. (N. Y.) 349. In Massachusetts, and in several of the States, it is held that all tenancies under parol and void leases are mere tenancies at will. *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Withers v. Larabee*, 48 Me. 570. In Tennessee they are treated either as creating a tenancy at will or from year to year, according to the circumstances. *Duke v. Harper*, 6 Yerg. (Tenn.) 280. And in Pennsylvania a tenancy at will is treated as a tenancy from year to year, and the same notice to quit is required in either case. *Clark v. Smith*, 25 Penn. St. 137. Holding that an entry under void lease and payment, &c., of rent creates tenancy from year to year upon the terms of the lease, see *Tress v. Savage*, 4 E. & B. 36; *Martin v. Watts*, 7 T. R. 83.

If, when premises are let for a year, or from year to year, the tenant holds over, the landlord may elect to treat him as a tenant from year to year, or when the renting is for a shorter period, and the tenant holds over, he will be deemed to hold upon the terms upon which he entered, and the landlord may recover rent of him according to the terms of the original contract or lease, or the landlord may at his election treat him as a trespasser and may bring ejectment against him without any previous notice, unless the holding over has been for such a time that it may be presumed that he assented thereto. *Smith v. Littlefield*, 51 N. Y. 539; *Blain v. Everett*, 36 Md. 73; *Hemphill v. Flynn*, 2 Penn. St. 144; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Brown v. Keller*, 32 Ill. 151; *Crommelin v. Theiss*, 31 Ala. 412; *Schuyler v. Smith*, 51 N. Y. 309; *Noel v. McCrary*, 7 Coldw. (Tenn.) 623; *Hall v. Myers*, 43 Md. 446; *Burbank v. Dyer*, 54 Ind. 392; *Parker v. Hollis*, 50 Ala. 411; *Usher v. Moss*, 50 Miss. 208; *Gardner v. Commissioners, &c.* 21 Minn. 33; *Hoof v. Ladd*, 1 Cranch (U. S. C. C.), 167; *Bacon v. Brown*, 9 Conn. 334; *Frantz v. Wood*, 2 Hill (S. C.), 367; *Haskins v. Pope*, 10 Ala. 493; *Quinette v. Carpenter*, 35 Mo. 502; *Laguerenne v. Dougherty*, 35 Penn. St. 45. A tenant who had leased premises for a year took them for a second on the expiration of the first year. It was held, that if the second lease was void from want of authority of the lessee, an officer of a corporation, and if the tenant should be regarded as holding over on the terms and conditions of the former lease, he became a tenant from year to year, and must give six months' notice to determine his tenancy; and that, having entered under the void lease, the fact of his being in possession under it, and the payment and acceptance of rent according to its terms, would

create a tenancy from quarter to quarter, not to be determined without three months' notice. A lessee for years whose term depends on a certainty, who holds over after the termination of the lease merely to remove his goods and chattels, none the less becomes a tenant from year to year by such holding over. A tenant for years whose term depends on a certainty, has no right to remain a reasonable time after his term expires for the purpose of removing his chattels. To entitle a landlord to regard a tenant under a demise for a year or more, as a tenant from year to year, upon his holding over after the expiration of his term, it is not necessary that the holding over should be of such a character as to raise a presumption that the tenant intends to continue his occupancy. *Witt v. Mayor, &c. of New York*, 6 Robt. (N. Y.) 441; *Quinette v. Carpenter*, 35 Mo. 502; *Frantz v. Wood*, *ante*: *Darrill v. Stevens*, 4 McCord (S. C.), 59; *De Young v. Buchanan*, 10 G. & J. (Md.) 149; *Dellar v. Roberts*, 13 S. & R. (Penn.) 60; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Moore v. Beasley*, 3 Ohio, 294.

But this is only a presumption of law, which stands until the contrary is shown, and it may be shown that the landlord accepted the rent under a mistake and in ignorance of the facts, or that the holding was in a character and for a purpose inconsistent with a tenancy. *Williamson v. Paxton*, 18 Gratt. (Va.) 475. An implied tenancy from year to year will be presumed to have commenced on the same day of the year as the original tenancy; but this is sometimes a question for the jury upon a consideration of all the facts. Although a parol lease for more than one year is invalid under the Statute of Frauds in most of the States, yet, if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease, and so continues as long as he remains in possession without any new or other agreement, and an occupancy, by having a portion of his property upon the premises, is sufficient to establish his liability, although there is no personal occupancy. Thus, where the defendant went into possession under a parol lease of a brick-yard and dwelling-house for one year, with the privilege of four years at his option, and continued in possession for two years, it was held that, although the lease was void as to the four years, yet, by the entry of the defendant and his holding over after the first year, it became a lease from year to year, subject to all the terms and conditions of the verbal lease, except as to the term. He went into possession in June, 1857, and in April, 1869, substantially told the plaintiff that he intended to leave at the end of that year, and at the end of the year he abandoned the house and removed *most* of the brick, but he left a portion of them in a shed, which he had erected upon the premises to protect the brick from the effects of the weather, and did not remove them until some time afterwards. The lease was never surrendered, nor did the plaintiff ever give his assent to the brick and shed being left there. The court held that the fact that

the brick and shed were left upon the premises by the defendant after the expiration of the second year, operated as such a continuance of his occupancy as to enable the landlord to treat him as a tenant for another year. *Dorr v. Barney*, 12 Hun (N. Y. S. C.), 259. See also to same effect *Schuyler v. Leggett*, 2 Cow. (N. Y.) 66; *Lounsbury v. Snyder*, 31 N. Y. 514; *Schuyler v. Smith*, 51 id. 309; *People v. Rickert*, 8 Cow. (N. Y.) 226; *Reader v. Sayre*, 6 Hun (N. Y. S. C.), 564; *Conway v. Starkweather*, 1 Den. (N. Y.) 113. Where the tenant holds over, see, holding that the terms of the former lease control, *Stoppiekamp v. Marryeat*, 42 Cal. 316; *Thiebaud v. Vevay*, 42 Ind. 212; *Hall v. Myers*, 43 Md. 446; *Bright v. McOuat*, 30 Ind. 521. But, it may be shown that the holding is really upon different terms, either wholly or in part. *Hunt v. Bailey*, 39 Mo. 257; *Despard v. Walbridge*, 15 N. Y. 374; *Mark v. Bent*, 5 Hun (N. Y.), 28. The question as to whether the holding is upon the terms of the former lease depends upon the circumstance, whether a new agreement has been entered into, or the tenant has received notice that if he remains he must do so upon certain other terms. *Hunt v. Bailey*, 39 Mo. 257. But upon principle, it would seem that, after a tenancy from year to year has actually set in, the terms of the tenancy cannot be changed by a mere notice, or by any notice except such as would be operative as a notice to quit, unless such terms are accepted.

A tenancy from year to year may be determined by either party at the end of the first or any subsequent year; unless, in creating the tenancy, the parties use expressions showing that they contemplate a tenancy for a longer period. A tenancy "for one year certain, and so on from year to year," cannot be determined before the end of the second year.

Where no express stipulation is made between the parties as to the length of notice required to be given, it seems that this may be regulated by custom; but there must be strong evidence of such custom, and the tenant takes the onus of establishing it, which must be shown by facts rather than by the opinions of witnesses, and, if the custom is not general, it must be shown to exist in the particular locality to which it is sought to apply it, and proof of a custom in an adjoining town is not sufficient.

If no such custom exists, it is a general presumption of law that if an estate from year to year is created, and nothing is said about determining it, the notice intended is half a year's notice, expiring at the end of some current year of the tenancy. *Murray v. Armstrong*, 11 Miss. 209; *Hamitt v. Lawrence*, 2 J. K. Mar. (Ky.) 366; *Darrell v. Johnson*, 17 Pick. (Mass.) 263; *Bedford v. McEthern*, 2 S. & R. (Penn.) 49; *Whitney v. Gordon*, 1 Cush. (Mass.) 266; *Allen v. Jaquish*, 21 Wend. (N. Y.) 261; *Clapp v. Paine*, 18 Me. 264; *Goddard v. R. R. Co.*, 2 Rich. (S. C.) 346; *Grode v. Howell*, 4 M. & W. 198; *Walker v. Constable*, 3 Wils. 25; *Bruner v. Wilkinson*, Co. Litt. 279 *b*, note; *Flower v. Darby*, 1 T. R.

159; *Pitcher v. Donovan*, 1 Taunt. 555; *Shore v. Porter*, 3 T. R. 13; *Martin v. Coutts*, 7 id. 85. In many of the States the common-law requirement as to the length of notice required has been materially changed by statute, being fixed in some at thirty days: *Larkin v. Avery*, 23 Conn. 304; three months, &c. But in all of them the rule remains the same as to the time when the tenancy can be so ended, to wit, *at the end of the current year*. *Prescott v. Elm*, 7 Cush. (Mass.) 346. In others the right to notice is mutual, and either the landlord or tenant desiring to end the tenancy must give the notice. *Grant v. White*, 42 Mo. 285; *Morehead v. Watkins*, 5 B. Mon. (Ky.) 228. In New Jersey a half year's notice is required in all cases of uncertain tenancy, whether from year to year or not: *Den v. Drake*, 14 N. J. L. 523; and in all the States where the statute does not otherwise provide, the common-law rule prevails.

NOTE 16. Tenancy from Month to Month, &c. — When premises are let for a month a mere neglect upon the part of the tenant to give up possession at the end of the month does not warrant a presumption of a contract for another month: *Neumister v. Palmer*, 8 Mo. App. 491; unless from the terms of the contract, or the usage or custom in that regard, if there is any, such an inference is warranted. In *People v. Paulding*, 22 Hun (N. Y.), 91, it was held that, where a monthly tenant holds over after the expiration of his lease, a continuation of the tenancy, and an enlargement of the same term is thereby created; and this doctrine seems to be well grounded in reason.

NOTE 17. Tenancy by Sufferance. — A tenant by sufferance is one who, although he entered lawfully, for a specified term or purpose, holds over without authority after the determination of the particular term. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128; *Keay v. Goodwin*, 16 Mass. 1; *Kingsley v. Ames*, 2 Met. (Mass.) 29; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182; *Hollis v. Pool*, 3 Met. (Mass.) 350; *Rising v. Stannard*, 17 Mass. 282; *Hauxhurst v. Lebru*, 38 Cal. 563; *Overdeed v. Lewis*, 1 W. & S. (Penn.) 90; *Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 128; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; *Kenney v. Sweeney*, 14 R. L. 581; *Perrine v. Teague*, 66 Cal. 446. Thus, a tenant at will, who remains in possession after the tenancy has been determined either expressly or by the death of the lessor: *Knight v. Quigley*, 2 Camp. 505; or a tenant for a year, or any other specified term: *Overdeed v. Lewis*, *ante*; or an under-tenant who holds over after the determination of the principal estate: *Simpkins v. Ashurst*, 4 Try. 781; a mortgagor who remains in possession after the expiration of a decree of foreclosure or a sale of the mortgaged premises: *Stedman v. Gossett*, 18 Vt. 346; *Kingsley v. Ames*, 2 Met. (Mass.) 29; or a lessee of a tenant for life, who remains in possession after the latter's death: *Torrey v. Torrey*, 14 N. Y. 430; *Livingston v. Tanner*, 14 id. 64; or one who enters under a contract to purchase, who remains in possession

after condition broken: *Cole v. Gill*, 14 Iowa, 527, — are tenants by sufferance, because they hold without right.

The distinction between a tenancy by sufferance and at will is, that a tenant at will is always in by right; but a tenant by sufferance holds over by wrong, after the expiration of a lawful title. *Co. Litt.* 576. If there is a joint occupation of land by the owner and another by agreement, the latter cannot be a tenant by sufferance. *Johnson v. Carter*, 16 Mass. 443. But if a person goes into possession under an agreement for a lease by the *cestui que trust*, but pays no rent, and the *cestui que trust* dies without executing a lease, he is only a tenant by sufferance as against the trustee. *Howard v. Carpenter*, 22 Md. 10. So long, however, as the agreement for the lease is operative, he is a tenant at will. Thus, where a tenant held over after the expiration of his lease, under an agreement for a lease of the same and additional premises, he was held to be a tenant at will. *Emmons v. Scudler*, 115 Mass. 367. So, where a person goes into possession under a parol lease for years, but agrees to quit if the demised premises shall be sold within the time, upon the sale thereof he becomes a mere tenant at sufferance. *Dallas v. Pool*, 3 Met. (Mass.) 350. In *Writer v. Stevens*, 9 Allen (Mass.), 526, two persons entered into an agreement to buy land and build a house thereon. A conveyance was made to one only, who boarded in the house with the other, who paid no rent, but occupied, under a written agreement, — the one in whom the legal title was vested having conveyed the land; it was held that the other became a mere tenant by sufferance after the conveyance. A person who holds over after the termination of his estate, under an agreement with, or by the permission of one who had no authority in the premises, is a tenant by sufferance. Thus, where a tenant for years, on the expiration of his lease applied to the attorney who drew the lease for a renewal of it, and the attorney told him that he had no authority to renew it, but that he (the tenant) might keep possession until he heard from the landlord, it was held that the tenant was a mere tenant by sufferance. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128. A grantee of land, no time being fixed in which possession shall be given, *instantly* upon delivery of the deeds, or if a time is agreed upon after the expiration of the time, becomes a tenant at sufferance; and if, before the time for delivering up possession, he permits another to enter, they both become tenants by sufferance. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; *Wood v. Hyatt*, 4 id. 313. In any event, a grantor, under such circumstances, is no more than a tenant at will. *Jackson v. Aldrich*, 13 Johns. (N. Y.) 106. A tenant who goes into possession under a written lease, at a rent payable quarterly, and holds over after the expiration of his term, is, in the absence of any agreement to the contrary, a tenant by sufferance, and he does not become a tenant at will by virtue of stipulations in the lease that he will “during the said term and for such further term as the said lessee or any other person claiming under him shall hold the premises, pay unto the said lessor the said

quarterly rent upon the day hereinbefore appointed for the payment thereof," and that he will "at the expiration of said term, peaceably yield up unto the said lessors, or those having their estate therein, all and singular the premises." Such a lease does not operate to give the lessee any right to occupy the premises beyond the term fixed therein. *Edwards v. Hale*, 9 Allen (Mass.), 462.

This tenancy is of such a nature as necessarily implies an absence of any agreement between the owner and the tenant, and if express assent is given by the owner to such possession, the tenancy is thereby, *instantly*, converted into a tenancy at will: *Rowan v. Little*, 11 Wend. (N. Y.) 619; or from year to year, according to the circumstances. If a tenant holding the premises for a specific term holds over after the term is ended, in the absence of any evidence to the contrary, the presumption is that his possession is wrongful. *Brown v. Keller*, 32 Ill. 151. This presumption attaches, and it is incumbent on the tenant to show that the landlord has in some way assented to his holding over, so as to convert his tenancy from that at sufferance to a tenancy from year to year. *Prima facie* he is a tenant by sufferance. *Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 123; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182. Thus, a tenant, under a written lease, at a rent payable quarterly, who holds over after the expiration of his term, is, *in the absence of any agreement* to the contrary, a tenant by sufferance; and this is so even though the lease contains language from which it may be inferred that a further term is contemplated. The burden is upon the tenant to show that the landlord has given his assent to his remaining, in some definite manner, and the mere fact that he has made no objection thereto does not change the character of his occupancy. *Edwards v. Hale*, 9 Allen (Mass.), 462. But this presumption may be overcome by any evidence which shows that the landlord or owner of the premises assented thereto: *Newell v. Stanford*, 13 Iowa, 191; as, that the landlord received rent from him: *Hollingsworth v. Stennett*, 2 Esp. 716; or, after a notice to quit, permitted him to remain upon the premises without suit or objection for a considerable period. In *Newell v. Stanford*, 13 Iowa, 191, the defendant, by the permission of the owner, entered upon premises and erected a house thereon. Shortly after the house was completed the owner served him with a notice to quit. He did not leave the premises, however, but remained there for several years without molestation from the owner. In an action brought by the owner to recover rent for the use of the house for the period subsequent to such notice, the court held that the notice did not change the relation or liability of the tenant from what it was before, and that he was not liable for rent.

A tenant by sufferance has no demisable interest in the premises, at least except against himself, and a tenant under him takes no better title than he himself had. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150. He stands upon a mere naked possession, and being a wrong-doer, if the landlord so elects to treat him, he cannot maintain trespass against the owner for an

entry upon the premises, because the owner has the right to enter and put an end to the tenant's possession by force, *instantly*: *Curtis v. Galvin*, 1 Allen (Mass.), 215; *Moore v. Mason*, 1 id. 407; 9 id. 530; and this applies to all persons holding under him. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150; *Wood v. Hyatt*, 4 id. 313. Except where provision is made therefor by statute, he is not entitled to notice to quit. *Ellis v. Paige*, 1 Pick. (Mass.) 47; *Livingston v. Tanner*, 14 N. Y. 64; *Torrey v. Torrey*, 14 id. 480; *Keich v. Hall*, Doug. 22; *Dorrell v. Johnson*, 17 Pick. (Mass.) 263; *Hauxhurst v. Lebru*, 38 Cal. 563; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; *Clapp v. Paine*, 18 Me. 624; *Stockwell v. Mark*, 17 id. 455; *Hollis v. Pool*, 3 Met. (Mass.) 350; *Doe v. Adams*, 12 N. J. L. 99; *Kingsley v. Ames*, 2 id. 29. Although at common law where the holding over had been long continued, a demand of possession was required, or an actual entry by the landlord or some person authorized by him, before the landlord could maintain trespass or ejectment against the tenant. *Crisp v. Barber*, 2 T. R. 749; *Harrison v. Murrell*, 8 C. & P. 134; Co. Litt. 57 b. In many of the States provision is now made by statute for the giving of notice, providing how and what notice shall be given, and the practitioner will find it advisable to consult the statutes of his own State upon this question.

The tenant's possession, at common law, is treated as wrongful, and he has no interest as against the landlord, or even as against a stranger, except that conferred by possession; and the landlord under certain circumstances can enter and put him out by force, provided he uses no more force than is necessary, and gather the crops, without liability to the tenant. *Hilary v. Gray*, 6 C. & P. 284; *Ives v. Ives*, 13 Johns. (N. Y.) 235; *Jones v. Muldrow*, 1 Rice (S. C.), 64; 12 Vt. 273; *Jackson v. Farmer*, 9 Wend. (N. Y.) 201; 2 W. & S. (Penn.) 225; *Butcher v. Butcher*, 7 B. & C. 399; *Taunton v. Costar*, 7 T. R. 431; 31 Me. 293; *Sampson v. Henry*, 11 Pick. (Mass.) 579; *Newton v. Harland*, 1 M. & G. 644; *Turner v. Maymatt*, 1 Bing. 158. But the landlord, while not liable to the tenant, unless guilty of excessive force, subjects himself to an indictment for a forcible entry. Archibald, Pl. & Ev. in Cr. Cas. 15th ed. 736. The plaintiff, having the right to the possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was temporarily absent, for the day only, from the house, which he had fastened upon leaving, entered the premises by forcing open the door, and placed the defendant's furniture in the street, and fastened up the house and left it. The defendant, on returning, forced open the door, and re-entered and occupied the premises. *Held*, that the plaintiff's entry was the exercise of a legal right in a legal manner, and that he could maintain trespass *qu. cl.* against the defendant for his subsequent entry. *Mussey v. Scott*, 32 Vt. 82.

But, his original entry being lawful, the landlord cannot maintain trespass against him until he has determined the estate by an actual entry

thereon, or some other equally decisive act. *Jackson v. McLeod*, 12 Johns. (N. Y.) 182. But as a tenant by sufferance must come into the possession by the act of the owner, if he comes in by any other method, as by act of law, he is a trespasser as soon as the estate or interest acquired by operation of law is determined, and as against the State no such tenancy can exist, as the State cannot be held guilty of laches. *Co. Litt.* 57 b.

This species of tenancy may be determined at any time by the entry of the landlord without any previous demand or notice to quit, and he may forcibly eject the tenant, using no more force than is necessary. *Fifty Associates v. Howland*, 5 Cush. (Mass.) 218; *Currier v. Gale*, 9 Allen (Mass.), 530. But it is *held* that where a tenant is put out by force, without previous demand, while he cannot maintain ejectment, he may maintain trespass (*Harrison v. Murrell*, 8 C. & P. 134), for the assault and battery, or injury to his goods, but not for trespass to the land or the disturbance of his possession, and the landlord would only be liable for excessive force or an *unnecessary* injury to his goods. *Overton v. Lewis*, 1 W. & S. (Penn.) 90.

At common law, rent is not recoverable of a tenant at sufferance, and if the landlord elects to treat him as a wrong-doer, he must be content to waive all contract liabilities that might exist if he elected to treat him as a tenant at will. *Flood v. Flood*, 1 Allen (Mass.), 217; 4 Cush. (Mass.) 42.

A tenant who holds over after his term has expired, and interferes with the re-letting of the premises, is liable to the landlord for the damages resulting to him therefrom: *Stoddard v. Waters*, 30 Ark. 156; but if the premises are leased to another party, and the tenant in possession refuses to let him in, the lessee's remedy is not against the landlord, but against the tenant holding over. *Gardner v. Keteltas*, 3 Hill (N. Y.), 530.

When a tenant under a lease for a term holds over after the termination of the time for which the premises were let to him, without any new demise, the landlord may elect to treat him as a trespasser or as a tenant holding under the terms of the original lease. *Hemphill v. Flynn*, 2 Penn. St. 144; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Conway v. Starkweather*, 1 Den. (N. Y.) 11; *Phillips v. Monges*, 4 Whart. (Penn.) 226. When a tenant holds over, whether he is a tenant for a term of years or from year to year, he impliedly holds according to the terms, and subject to all the conditions of the original lease which are applicable to his new situation, and the law will imply those terms which are found in the contract which has expired. *DeYoung v. Buchanan*, 10 G. & J. (Md.) 149; *Witt v. Mayor, &c.*, 5 Robt. (N. Y. Superior Ct.) 248; *Bradley v. Covell*, 4 Cow. (N. Y.) 349; *Osgood v. Demey*, 13 Johns. (N. Y.) 240; *Quinette v. Carpenter*, 35 Mo. 502; *Deller v. Roberts*, 13 S. & R. (Penn.) 384; *Longuemore v. Dougherty*, 35 Penn. St. 45; *Moore v. Basely*, 3 Ohio, 294; *Bacon v. Brown*, 9 Conn. 334; *Bruner v. Knapp*, 1 Pick. (Mass.) 332; *Harkins v. Pope*, 10 Ala. 493; *Hunt v. Wolfe*, 2 Daly (N. Y. C. P.), 298. And he is subject to a distress, whether the lease is by parol or by deed. *Webber v.*

(N. Y.) 297; *Singer Manuf. Co. v. Sayre*, 75 Ala. 270. The landlord's election is conclusive both upon the tenant and himself. *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134; *Elwood v. Forkel*, 35 Hun (N. Y.), 202.

NOTE 18. Tenancy at Will, how created; Incidents of.—A tenant at will is one who enters lawfully into the possession of lands, but for no definite term or purpose, and whose term is liable to be determined *at the will* of his landlord. The distinction between a tenancy at will and by sufferance, is, that both the entry and the occupancy of a tenant at will are lawful, while the *entry* of a tenant by sufferance is lawful, but his occupancy is *unlawful*. All leases for an indefinite term are leases at will. *Jones v. Shay*, 50 Cal. 508; *Rich v. Botton*, 46 Vt. 84; *Larned v. Hudson*, 60 N. Y. 102; *Jackson v. Bradt*, 2 Cas. (N. Y.) 169. A reservation of rent is not essential to create this species of tenancy, and a person who occupies "rent free" may occupy this relation. *Herrell v. Sizeland*, 81 Ill. 457. Thus, where the owner permits a person to occupy premises without any lease or agreement to pay rent, and the occupier merely takes care of the premises for the owner, he is a tenant at will. *Jones v. Shay*, 50 Cal. 508; *Herrell v. Sizeland*, 81 Ill. 457. In *Humphries v. Humphries*, 3 Ired. L. (N. C.) 362, it was held that, where a person is put in possession of land without any agreement for rent, but with an express provision that he shall leave whenever the owner shall require him to do so, he is strictly a tenant at will, and not entitled to notice to quit. In *Whoon v. Drizzle*, 3 Dev. L. (N. C.) 414, the owner of land agreed that A. should cultivate it during his life, or as long as he pleased, with a restriction as to the sale of it, and it was held that only a tenancy at will existed.

A person who enters by the naked permission of the owner is a tenant at will. *Larned v. Hudson*, 60 N. Y. 502; *Williams v. Derriar*, 31 Mo. 13; *Jones v. Shay*, 50 Cal. 508. A mere general letting: *Richardson v. Langridge*, 4 Taunt. 132; *Roe v. Lees*, 2 W. Bl. 1173; or a simple permission to occupy, unless there is an evident intention to create a tenancy from year to year, or some other term, creates a tenancy at will. *Hull v. Wood*, *ante*; *Doe v. Gardner*, 12 C. B. 319. So a *cestui que trust*, in the actual possession by the consent or acquiescence of the trustee, is a tenant at will; but merely receiving the rents does not make him so. *Melling v. Leak*, 16 C. B. 652. The fact that a person pays rent does not change the character of the tenancy, unless he pays it with reference to a yearly holding. *Barstow v. Cox*, 11 Q. B. 122; *Anderson v. Midland Ry. Co.*, 3 E. & E. 614; *Cox v. Bent*, 5 Bing. 185; *Braithwaite v. Hitchcock*, 10 M. & W. 497. A person who enters without permission, as a mere squatter, without any claim of title: *Stamper v. Griffin*, 20 Ga. 312; *Gay v. Mitchell*, 35 Ga. 159; *Smith v. Houston*, 16 Ala. 111; *Weaver v. Jones*, 24 Ala. 420; or a person who enters under a void lease is a

tenant at will. *Ezelle v. Parker*, 41 Miss. 20; *Cromelin v. Thies*, 31 Ala. 412. In Tennessee, where a parol lease for two years is void, a tenant entering under it is held to be a tenant at will: *Duke v. Harper*, 6 Yerg. (Tenn.) 280; and in Maine a parol lease at an annual rent creates a tenancy at will. *Withers v. Larrabee*, 48 Me. 570; *Cole on Ejectment*, 456. But he holds, subject to the terms of the lease in all other respects except as to duration of the term. *Riggs v. Bell*, 5 T. R. 471; *Tress v. Savage*, 4 E. & B. 36; *Richardson v. Gifford*, 1 Ad. & El. 52; *Pennington v. Tanriere*, 12 Q. B. 998; *Lee v. Smith*, 9 Exch. 662; *Arden v. Sullivan*, 14 Q. B. 832. But upon payment of rent, he becomes a tenant from year to year, under the terms of the void lease, so far as they are applicable to, and not inconsistent with, a yearly tenancy. *People v. Rickert*, 8 Cow. (N. Y.) 226; *Strong v. Crosby*, 21 Conn. 398; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660. But see *Jackson v. Rogers*, 1 Johns. Cas. (N. Y.) 33, where a tenant who went into possession under a void lease was held to be a mere trespasser, and not entitled under the statute to a notice to quit. And the same is true as to one who enters under a contract to purchase. *Patterson v. Stoddard*, 47 Me. 355; *Proprietors, &c. v. McFarland*, 12 Mass. 325; *Jones v. Jones*, 2 Rich. (S. C.) 542. Considerable confusion exists in the cases as to the true relation between the owner and occupier during the pendency of a contract to purchase. Some of the cases hold that, whether the contract is completed by a conveyance or not, no tenancy exists. *Carpenter v. United States*, 6 Ct. of Cl. (U. S.) 157. But while it is true that the relation of landlord and tenant does not exist in its full sense, or to the extent that the rent may be recovered unless specially so agreed, yet there would seem to be no question but that the relation in a *restricted or limited sense* does exist. The contractee goes in by the *permission* of the owner, and while from such permission alone a contract to pay rent cannot be implied, and the liabilities of strict tenancy are not incurred, yet, during the pendency of the contract, he certainly holds under the owner, and his possession cannot be adverse to him. Therefore he stands as a tenant at sufferance or will, and can be put out of possession by the owner, if from any cause the conveyance is not made without notice to quit: *Tucker v. Adams*, 52 Ala. 254; and is not entitled to crops planted by him if he is forcibly expelled before they mature. *Harris v. Frink*, 2 Lans. (N. Y.) 35. According to the English cases, if a party contracting for land be let into possession, he is tenant at will by implication of law. *Stanway v. Rock*, C. & M. 594; *Tomes v. Chamberlain*, 5 M. & W. 14. If the sale goes off *from that time*, if he remains in possession he still continues tenant at will, but from that time may be liable for use and occupation; for the purchase-money, which was to be the compensation for his occupation, is forfeited to the vendor. *Tew v. Jones*, 13 M. & W. 12; *Kirtland v. Paunsett*, 2 Taunt. 145. But if the purchase is made, he cannot be made liable for his occupation

1 Ad. & El. 52; *Beale v. Sanders*, 3 Bing. 850; and in the cases last named the tenant was held bound by the covenants to repair. In the case last cited the defendants had for several years occupied and paid rent, *as assignees*, under a void lease. The lease contained a warrant on the part of the lessees to keep the buildings and premises in repair. The court held that the assignees were liable to repair to the end of the term, but that their liability to repair under this implied assumpsit ceased with the termination of the term fixed in the lease. It was held that although the lease was void, yet, as the defendants held the premises to the end of the term, and continued to pay the rent, they are liable to all the stipulations contained in the lease, in the same way as a tenant who holds upon the expiration of a void lease. This doctrine was also held in *Pistor v. Cator*, 9 M. & W. 315, in which the tenant entered into possession under an agreement for a lease *as soon as the lord's license could be obtained*, in which he was to covenant to repair. No lease was ever obtained, and no lease was ever made, yet he was held liable to repair so long as he occupied. In this case, however, it should be stated that the tenant *occupied for the whole term agreed upon*. The defendant having occupied for the whole of the term agreed upon, and having had the full benefit which he could have enjoyed under the lease, he cannot say that the covenants are not binding because the lease was not granted. In all these cases the tenant had the benefit of the full term. If the landlord had evicted him before the full term expired, as he might have done by giving proper notice to quit, a different question would have been presented, and possibly with a different result. In the case of such tenancies, the landlord may put an end to them at any time by notice to quit of the usual length. *Chapman v. Towner*, 6 M. & W. 100. But in any event they are put an end to by the determination of the term, without any notice to quit, and this is one of the peculiarities of this species of tenancy from year to year: *Tilt v. Stratton*, 4 Bing. 446; *Berney v. Lindley*, 3 M. & Gr. 511. The doctrine of these cases as to the occupancy of a tenant under a void lease being subject to the terms of the lease, so far as they are applicable to the relation, is generally accepted by our courts: *Lockwood v. Lockwood*, 22 Conn. 425; *Strong v. Crosby*, 21 id. 398; *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100; *People v. Rickert*, 8 Cow. (N. Y.) 227; *Creech v. Crockett*, 5 Cush. (Mass.) 133; *Hollis v. Pool*, 3 Met. (Mass.) 350; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660; *Edwards v. Clemons*, 24 Wend. (N. Y.) 480; *Prindle v. Anderson*, 23 id. 616.

But upon the point that a tenant under a lease void under the Statute of Frauds becomes a tenant from year to year upon payment of rent, there is a great diversity of doctrine, growing out of the difference in the language of the statute. In Massachusetts, in several cases under the statute of 1783, chap. 37, sec. 1, it is held that nothing more than a tenancy at will exists under parol leases, either for a certain or uncertain

term, and that this tenancy cannot be enlarged into a tenancy from year to year by entry and payment of rent. *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Hollis v. Pool*, 3 Met. (Mass.) 151; *Kelly v. Waite*, 12 id. 300; *Bingham v. Sprague*, 10 Pick. (Mass.) 102. And a similar doctrine has been held in Maine: *Davis v. Thompson*, 13 Me. 214; *Withers v. Larrabee*, 48 id. 570; and in New Hampshire: *Whitney v. Swett*, 22 id. 10. And in the latter State it is held that a tenancy, shown by written receipts for rent to be from year to year, or month to month, is but a lease at will: *Whitney v. Swett*, *ante*; and a similar doctrine is intimated in *Cromelin v. Theis*, 31 Ala. 411. But in most of the States the English doctrine prevails. *Hull v. Wadsworth*, 28 Vt. 10; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391, affirmed 23 id. 616; *Jackson v. Wilsey*, 9 Johns. (N. Y.) 267; *Ridgeley v. Stillwell*, 28 Miss. 400; *McDowell v. Simpson*, 3 Watts (Penn.), 135; *Pugsley v. Aiken*, 11 N. Y. 494; *Porter v. Gordon*, 5 Yerg. (Tenn.) 100; *Drake v. Newton*, 3 N. J. L. 111. And unless the language of the statute is such as to prevent such a construction, it would seem to be the better doctrine that, while in the first instance those who occupy such holdings are merely tenants at will, yet the estate is susceptible of being enlarged into a tenancy from year to year, and that this is done whenever a yearly rent is reserved in the lease, — when the tenant pays, and the landlord accepts the rent. *Silsby v. Allen*, 43 Vt. 172. In *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103, it was held that payment of a quarter's rent is evidence of a yearly tenancy at that rate. It seems that actual payment of the rent is not necessary; but in one case an admission by the tenant of a half-year's rent in an account of the landlord was held sufficient: *Cox v. Burt*, 5 Bing. 185; *GOSKLER, J.*, before whom the case was tried at the assizes, saying, "the admission was equivalent to the payment of so much rent, and that the plaintiff thereby became tenant from year to year."

See, for English cases holding that a tenant under a void lease is a tenant from year to year, *Tress v. Savage*, 4 E. & B. 36; *Doe v. Calling*, T. C. B. 933; *Lee v. Smith*, 9 Exch. 662; *Davenish v. Moffatt*, 15 Q. B. 257. Holding that a similar result ensues from an entry under an agreement for a lease: *Bolton v. Tomlin*, 5 Ad. & El. 856; *Doe v. Smith*, 1 Man. & R. 137; *Mann v. Lovejoy*, Ry. & Moo. 355; *Bennett v. Ireland*, E. B. & E. 326; *Knight v. Bennett*, 3 Bing. 361; *Chapman v. Towner*, 6 M. & W. 100; *Cox v. Burt*, 5 Bing. 185; *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Doe v. Amey*, 12 Ad. & El. 476; although the agreement is void: *Knight v. Bennett*, *ante*. Also that it arises from implication of law by payment of yearly rent. *Braithwaite v. Hitchcock*, *ante*; *Hull v. Wood*, 14 M. & W. 682; *Tress v. Savage*, *ante*; *Davenish v. Moffatt*, *ante*; *Doe v. Tanriere*, 12 Q. B. 998. But this is only an inference of law, which cannot be raised against the intention of the parties clearly expressed, and it seems that it cannot arise where the tenant fails to comply with conditions precedent established either by contract, usage, or law. Thus, in an

Iowa case, *Dubuque v. Miller*, 11 Iowa, 583, the tenant of a market stall, under lease for one year from the city, at the close of the lease held over without complying with certain terms as to the payment of rents made by the city for such second year, and the court held that his tenancy was only at will. In order to transform a tenancy for an uncertain period into a tenancy from year to year there must be a reservation of annual rent, and unless there is such a reservation the tenancy is *prima facie* only a tenancy at will. Thus, in an English case, the landlord let a shed to be used as a stable, for the dung that was made therein as compensation. No definite term was agreed upon, and the court held that the tenancy was merely one at will, because there was no reservation of rent referable to a year, or any aliquot part thereof. And it seems that an implied obligation to pay rent is not enough to convert a tenancy at will into a tenancy from year to year. Thus, in a Vermont case, *Rich v. Bolton*, 46 Vt. 84; *Chamberlain v. Dunham*, 45 id. 50, the defendant, by the parol permission of the plaintiff, went into possession of certain premises as tenant, without any agreement as to the terms of holding or the payment of rent, and continued in possession about fourteen years. He erected a barn on the premises and repaired the house. The plaintiff tried to settle with him, but could get nothing from him beyond the repairs, and it appeared that he refused to pay rent. The plaintiff brought an action to recover the possession of the premises, giving no notice to quit. The defendant resisted the action upon the ground that his tenancy had ripened into a tenancy from year to year, and, consequently, that he was entitled to six months' notice to quit. But the court held that the tenancy was merely one at will, because it lacked the essential element of annual rent, and that the fact that the repairs upon the premises were to be allowed upon the rent did not amount to a yearly payment of rent, but were merely payments in gross for the whole occupancy.

In Vermont, under the statute, a parol lease with a stipulation to pay an annual rent is an "estate at will" only; but it has been held in several cases that the character of the tenancy may be changed and become one from year to year by subsequent acts of the parties; as, by entry into possession by the tenant, and a payment by him, and an acceptance by the landlord of the rent stipulated to be paid, and continuing in possession beyond the first year. *Barlow v. Wainwright*, 22 Vt. 88; *Silsby v. Allen*, 43 Vt. 172; *Hull v. Wadsworth*, 28 Vt. 410. *And this change is not wrought by the length of time that the tenant holds and pays rent, but by the fact that he enters and holds under a stipulation to pay annual rent, and pays accordingly.* *Silsby v. Allen*, 43 Vt. 172. It has been held that an entry upon and a continuance in possession of premises for several years under a parol agreement to support the owner, creates a tenancy from year to year, because the support furnished is treated as in the nature of yearly rent. *Hanchett v. Whitney*, 1 Vt. 311. But in New Hampshire, as well

as in all other States where the statute provides that no estate or interest in lands, except an estate at will, can be created except in writing, a tenancy from year to year cannot be raised from any occupancy however long, or the payment of annual rent. *Whitney v. Swett*, 22 N. H. 10; *Davis v. Thompson*, 13 Me. 214; *Young v. Young*, 36 Me. 133; *Hollis v. Pool*, 3 Met. (Mass.) 351.

It may be said *prima facie* that leases, indefinite as to the term, merely create a tenancy at will; and only a reservation of annual rent converts them into leases from year to year. It is not essential that there should be stipulation for the payment of rent in money, or of a certain amount, but there should be a reservation of some benefit or advantage that stands as yearly rent. A lease indefinite as to terms, but reserving an annual rent payable quarterly, is held in Pennsylvania to be a lease from year to year, and cannot be terminated except by regular notice to quit, and if such notice is not given, and if the tenant commences a new year without any notice to quit having been given, the landlord cannot put him out until the end of the next year; but for the second year the tenant must pay according to the terms of the lease: *Lesley v. Randolph*, 4 Rawle (Penn.), 123; and the courts latterly are inclined to construe all leases at will at an annual rent as leases from year to year. In many of the States, all parol leases merely create a tenancy at will; as in Massachusetts, Maine, Vermont, &c. But when the lease in terms creates only a tenancy at will, the fact that rent is reserved and paid in pursuance of such reservation does not change the character of the tenancy. The intention of the parties, if clearly expressed, will control. Thus, where a tenant entered under an agreement "to become tenant at the will and pleasure of" the landlord "and at and after the rate of twenty-five pounds per annum, payable quarterly," the tenancy was held to be at will, and not from year to year. Lord DENMAN, C. J., said: "The courts are desirous to presume a tenancy from year to year *where parties do not express a different intention*, but here they have expressed it." *Barstow v. Cox*, 11 Q. B. 122. The reservation of yearly rent is not inconsistent with a tenancy at will. *Co. Litt.* 556; *Walker v. Giles*, 6 C. B. 662. And where the terms of the lease are such as to show a clear intention to create a tenancy at will, the reservation and payment of the yearly rent, and an occupancy under it for a period of time, however long, will not change its character. *Dixie v. Davis*, 7 Exch. 89. The English courts are inclined to hold all tenancies for an indeterminate period, except where otherwise clearly provided, tenancies from year to year, where there is a reservation of annual rent; and even in some cases they have so held where there was no such reservation, but rent had been so paid. *Parker v. Walker*, 1 Wils. 25. And a similar doctrine was held in *Jackson v. Bryan*, 1 Johns. (N. Y.) 323; but this is only the case where there is nothing to indicate a contrary intention. When it is clearly the intention of the parties to create only an estate at will, their intention

will be upheld, notwithstanding the reservation of an annual rent. *Anderson v. Midland R. R. Co.*, 30 L. J. Q. B. 94; *Stedman v. McIntosh*, 4 Ired. L. (N. C.) 291; *Humphries v. Humphries*, 3 id. 363. In a Massachusetts case it was held that a written lease of a house at a certain rent per annum, payable "in monthly payments, otherwise *pro rata*," for a term, to begin "when said house is suitable to be occupied" by the lessee, and undefined in duration, except by a stipulation that if, after two years from the time when the lessee should move into the house, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such a time as may be agreeable to us both," creates only a tenancy at will; and parol evidence is inadmissible to give it a different construction. *Murray v. Cherrington*, 99 Mass. 229.

Where, by the terms of a written lease, the tenancy is to continue so long as the parties shall mutually agree, and either party may determine it on four days' notice, — the rent to be paid monthly or semi-monthly, as may be most convenient, — such renting creates a tenancy at will; and the lessee, in such case, acquires no certain indefeasible interest in the premises, which he can sell and transfer to another. Such tenancy will be determined, by implication of law, upon the death either of the lessor or lessee; by the desertion of the premises by the lessee; or by the sale and transfer of his possession to another. Therefore, where during such a tenancy the lessor died, having by will devised the premises, and the lessee a month afterwards sublet a portion of the premises to the plaintiff without the consent of the devisee, and shortly thereafter removed wholly therefrom; and the devisee thereupon entered and removed doors and windows from a dwelling-house situated on the demised premises, and in the occupancy of the plaintiff, without unnecessary interference with the person or property of the plaintiff, and without a breach of the peace, such entry and acts of ownership were not tortious, and do not constitute a cause of action in favor of the plaintiff against the devisee. *Say v. Stoddard*, 27 Ohio St. 478. In another case, *Walker v. Giles*, 6 C. B. 662, it was held that a clause in a mortgage that the mortgagors should become tenants to the mortgagees of the demised premises during their will, at a yearly rent, created only a tenancy at will. *Dixie v. Davis*, 7 Exch. 89.

The cases are not quite agreed, as to whether a person entering into possession under a contract to purchase is a mere licensee or a tenant at will. But, without stopping to point out or discuss this conflict of doctrine, it may be safely stated that the great weight of authority is in support of the rule that a vendee entering into possession under his contract is a tenant at will in a qualified sense, namely, as owner. *Lane v. Edmondston*, 1 Ired. L. (N. C.) 152; *Towne v. Butterfield*, 98 Mass. 106; *Patterson v. Stoddard*, 47 Me. 355; *Jones v. Jones*, 2 Rich. S. C. 542; *Manchester v. Doddridge*, 3 Ind. 360; *Proprietors, &c. v. McFarland*, 12

Mass. 325; *Carpenter v. United States*, 17 Wall. (U. S.) 489. The tenancy results from an inference of law. It is not the contract, but *the letting into possession* that creates the tenancy. It is quite evident that a vendee entering into possession under a contract to purchase, with the assent of the owner, cannot be regarded as a trespasser, nor upon the other hand can he be regarded as having more than the lowest estate known to the law, to wit, a tenancy at will. *Howard v. Shaw*, 8 M. & W. 118. A tenant thus let into possession cannot, in the absence of an agreement to that effect, be charged for use and occupation. *Bell v. Ellis*, 1 S. & P. (Ala.) 295.

The rule may be said to be that where a person enters into possession of lands with the assent of the owner, *under such circumstances that it cannot be said that his occupancy was to be gratuitous, and the compensation therefor is not referable to any other consideration, the law will imply the requisite promise to uphold an action for use and occupation.* But where there is nothing in the contract to indicate that anything is to be paid for such occupancy, the fact that he went in by the *permission* of the vendor, as a part of the contract, has no tendency whatever to create against him liability for the use and occupation of such premises, *because the payment of the purchase-money is the only compensation that the parties had in contemplation*, and a promise cannot be implied where the contract is express and repels any such presumption; and the relation of landlord and tenant does not exist until the contract goes off by the default of one or both of the parties thereto. In *Smith v. Stewart*, 6 Johns. (N. Y.) 46, the defendant had been for several years in possession of lands belonging to the plaintiff under a contract to purchase, and from time to time promised to pay the purchase-money, but not having done so, the plaintiff brought assumpsit for use and occupation against him. The court held that the action would not lie, as the relation of landlord and tenant did not exist, and that the defendant, by his refusal to perform, had become a trespasser, and in that character might be turned out and made responsible for the mesne profits; and the same doctrine has been held in numerous American cases. *Vanderhevel v. Storrs*, 3 Conn. 203; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489. In *Bell v. Ellis*, 1 S. & P. (Ala.) 295, the court says, "The correct doctrine is that this action upon an implied promise for rent will only lie by virtue of the statute when the relation of landlord and tenant is preserved, and that this relation will be destroyed when the possession is held under a contract of sale, though that contract may be void, ineffectual to convey the premises, or even though the sale is prevented by the purchaser himself." See also to the same effect, *Hough v. Birge*, 11 Vt. 190; *Brewer v. Conover*, 18 N. J. L. 215. And even in Kentucky, where it has been held that assumpsit for use and occupation lies where a party goes in with the assent of the owner, and there has been a beneficial occupancy, it was held that the action would not lie where the party entered as a purchaser, because the relation of vendor and vendee rather than that of landlord and tenant existed, and thus the

presumption of a promise was directly repelled. *Jones v. Tipton*, 2 Dana (Ky.), 295. See also *Little v. Pearson*, 7 Pick. (Mass.) 301. In the case of *Winterbottom v. Ingham*, 7 Q. B. 611, the defendant went into possession of an estate under a purchase at an auction sale, and held the premises pending an investigation. The contract was afterwards determined for want of title, and the court held that an action for use and occupation would not lie against the purchaser. It was formerly thought, although not directly held, that the right to recover in such cases depended upon the question whether such occupation was beneficial to the vendee or not; but now the right of recovery is made to depend upon the circumstance *whether there is anything in the contract which warrants the inference, that during the pendency of the contract the parties stood to each other in the relation of landlord and tenant, or merely in that of vendor and vendee*, or in other words, *whether anything more than a naked tenancy at will existed*. *Right v. Beard*, 13 East, 210; *Hugh v. Birge*, 11 Vt. 190; *Jones v. Tipton*, 2 Dana (Ky.), 295; *Little v. Pearson*, 7 Pick. (Mass.) 301; *Smith v. Stewart*, 6 Johns. (N. Y.) 746; *Vanderheuvcl v. Storrs*, 3 Conn. 203; *Bell v. Ellis*, 1 S. & P. (Ala.) 295; *Bancroft v. Wardwell*, 13 Johns. (N. Y.) 489.

When, at the time a contract of purchase is entered into, the vendee is in possession as a tenant, the question as to whether, under the contract, his relation is changed from that of tenant to a mere vendee, depends upon the intention of the parties, to be gathered from the contract and the attendant circumstances; and the contract and the circumstances must be such as to overcome the presumption that a tenancy, once shown to exist, continues until it is shown to have been determined, and it would seem that a contract of sale absolute in its terms, and which involves no contingency, has that effect. Thus in an Alabama case, *Bell v. Ellis*, 1 S. & P. (Ala.) 295, a person who entered into possession under a lease for a definite term, subsequently entered into a contract with the administrator of his lessor to purchase the premises from him. In point of fact, the administrator had no power to sell the premises, and the contract was not performed by him. The court held that, upon the making of the contract to purchase, although void, the relation of the parties was changed from that of landlord and tenant to that of vendor and vendee, and that no recovery could be had from the vendee for the use and occupation of the premises under the contract. But where the contract is dependent upon a contingency, as, if the tenant contracts to purchase, if the landlord "can make a good title," it is held that the relation of the parties is not changed by the contract until the purchase is actually consummated.

A tenant at will has no estate in the premises which he can lease or otherwise convey, except that, as against himself, he may create a tenancy by estoppel. Yet he has, by reason of his possession, such an interest that he can maintain trespass for an injury to his possession, or an action

for a nuisance interfering with the comfortable enjoyment of the estate. *Hilbourn v. Fogg*, 99 Mass. 11; *Foley v. Wyeth*, 2 Allen (Mass.), 135. He may terminate his estate at any time he pleases. Indeed either party may terminate the estate *instantly*, and without notice: *Munroe v. Mizner*, 10 Gray (Mass.), 290; *Ellis v. Paige*, 1 Pick. (Mass.) 49; unless, as is the case in several of the States, the statute provides that notice of a certain duration shall be given.

The landlord may determine the estate by any decisive act done upon the land, for which otherwise he would be liable in trespass. Thus, if the landlord does that which is equivalent to a demand of possession, — as if he exercises any act of ownership upon or over the land, as by entering and cutting down trees, or makes a feoffment or lease for years to commence immediately, — the estate at will is determined. *Ball v. Cullimore*, 2 C. M. & R. 122; *Howell v. Howell*, 7 Ired. (N. C.) 496; *Rising v. Stannard*, 17 Mass. 282; *Kelly v. Waite*, 12 Met. (Mass.) 300; *Keay v. Goodwin*, 16 Mass. 1; *Ellis v. Paige*, 1 Pick. (Mass.) 43. And the same result ensues from a partition of the land: *Rising v. Stannard*, *ante*; the granting of another lease at will and giving seizin and possession to the lessee: *Ellis v. Paige*, *ante*; or the death of the landlord: *Robie v. Smith*, 21 Me. 114; *Paige v. Wright*, 14 Allen (Mass.), 182; or any act that determines the will under which the estate is held: *Howell v. Howell*, *ante*.

The intent of an entry is undoubtedly in many cases important, *but in the case of a tenancy at will*, whatever be the intent of the landlord, *if he does any act upon the land for which he would otherwise be liable in an action of trespass at the suit of the tenant*, such act is a determination of the will, for so only can it be a lawful and not a wrongful act. *A tenant at will has a mere scintilla of interest*, which the landlord may determine by making a lease with livery upon the land, or by a demand of possession. *Ball v. Cullimore*, *ante*. So the estate may be determined by implication, as by a conveyance by the landlord: *Curtis v. Galvin*, 1 Allen (Mass.), 215; *Ela v. Banks*, 37 Wis. 89; or by a lease of the same to commence presently: *Howard v. Morris*, 5 Cush. (Mass.) 563; *Kelly v. Waite*, 12 Met. (Mass.) 300; or by the death of either party: *Rising v. Stannard*, 17 Mass. 284; *Robie v. Smith*, 21 Me. 114; *Paige v. Wright*, 14 Allen (Mass.), 182. But see *Morton v. Woods*, L. R. 4 Q. B. 306. The estate may also be determined by a disclaimer of the landlord's title by the tenant: *Montgomery v. Craig*, 5 Dana (Ky.), 101; *De Lancey v. Ganong*, 9 N. Y. 9; or by any act of the tenant inconsistent with an estate at will: *Ball v. Cullimore*, *ante*.

NOTE 19. Landlord bound to disclose Defects in Premises dangerous to the person or injurious to the health of Tenant. — In *Minor v. Sharon*, 112 Mass. 477, the premises had been occupied by a tenant who had small-pox there, and the landlord, knowing the fact, let the premises to the plaintiff without disclosing the fact. The plaintiff,

in consequence, took no precautions, and contracted the disease. It was held that the landlord was liable for the damages resulting to the plaintiff therefrom. See also *Ceasar v. Karutz*, 60 N. Y. 229. It is the landlord's duty to disclose any defects in the premises which are injurious to the health of the tenant or his family, or which endanger their personal safety. Thus, in *Coke v. Gutkese*, 80 Ky. 508, 44 Am. Rep. 499, the defendant let premises to the plaintiff's father, knowing that the timbers to the privy floor were rotten, and in a dangerous condition. The plaintiff, a daughter of the tenant and a member of his family, fell through the privy floor, and was seriously injured. It was held that it was the duty of the landlord to disclose this defect to the tenant, and that having failed to do so, and the defect being of such a character that the tenant could not discover it by casual inspection, — in other words, by ordinary observation, — he was liable for the damages.

In *Eaton v. Winnie*, 20 Mich. 156, the defendant occupied a pasture as licensee, and pastured a flock of sheep there which was infected with foot-rot. Immediately after the defendant took his sheep away the plaintiff turned his sheep into the pasture, and the disease was communicated to them. The plaintiff was ignorant of the nature of the disease or its mode of communication, and was falsely informed by the defendant that there was no danger. He was held entitled to recover. See also *Wilson v. Finch Hatton*, L. R. 2 Exch. Div. 236; *Scott v. Simons*, 54 N. H. 426. In *Ceasar v. Karutz*, *ante*, it appeared that the plaintiff being in search of apartments for herself and her three children, she, on April 19, applied to the defendant, who was the owner of a tenement house in Brooklyn, and he then exhibited to her two rooms in the third story of the house, which she hired. Four days afterwards she cleaned the rooms, and moved into them two days after, with her children. Early in May she was taken sick with the small-pox, and thereupon removed to the hospital. She contracted the disease, as she claimed, in those rooms. Prior to the hiring of the rooms by her, they had been occupied by a family, one of whose members (a child) had died of that disease. The defendant, as the plaintiff's evidence tended to show, had notice of this fact, but took no measures to disinfect the rooms, and suppressed from her the fact that they were infected. The judge charged the jury "that if a landlord lets premises to a tenant, and they are infected, *and he knows it*, it is his duty to let the tenant know it," but that, unless the landlord knew of the infection, he could not be made liable. The plaintiff had a verdict for \$1,500, which was sustained upon appeal.

NOTE 20. **Mortgagor and Mortgagee, Relation of, to the mortgaged Estate.** — The tendency of our courts, and the great weight of authority in this country is in support of the doctrine that the mortgagor is, until condition broken, the legal owner of the estate, and that the mortgage is a mere security for the debt or obligation it was given to

secure. *Hall v. Saville*, 3 Iowa, 37; *Elfe v. Cole*, 26 Ga. 197; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Jackson v. Lodge*, 36 Cal. 28; *Caruthers v. Humphrey*, 12 Mich. 270; *United States v. Athens Armory*, 35 Ga. 344; *Thayer v. Cramer*, 1 McCord Ct. (S. C.) 395; *McMillan v. Richards*, 9 Cal. 365; *Seals v. Cashier*, 2 Ga. Dec. 76; *Whittemore v. Shwerick*, 3 Nev. 288; *Goodenow v. Ewer*, 16 Cal. 461; *Rayland v. Justices*, 10 Ga. 65; *Baggs v. Hargram*, 16 Cal. 559; *Davis v. Anderson*, 1 Ga. 176; *Fogarty v. Sawyer*, 17 Cal. 589; *Bludworth v. Lake*, 33 Cal. 265; *Dutton v. Warschauer*, 21 Cal. 609.

In New York, both at law and in equity the mortgagor is treated as the owner of the fee and the mortgage is regarded as a mere *chose in action*, a mere security of a personal nature. *Parker v. Rochester, &c. R. R. Co.*, 17 N. Y. 283; *Timm v. Marsh*, 54 N. Y. 599; *Merritt v. Bartholick*, 36 N. Y. 44; *Jackson v. Willard*, 4 Johns. (N. Y.) 42; *Power v. Lester*, 23 N. Y. 527; *Kortright v. Cady*, 21 N. Y. 343; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

In Alabama, a mortgage is regarded as possessed of a dual nature, that is, it has one character in a court of law, and another in a court of equity, but the legal estate remains in the mortgagor until condition broken, when it vests in the mortgagee. *Welsh v. Phillips*, 54 Ala. 309. In Arkansas, the legal estate, as between the mortgagor and mortgagee, is treated as being in the latter, but as to third persons, it is treated as being in the mortgagor. *Terry v. Rosell*, 32 Ark. 478. See also *Blanchard v. Brooks*, 12 Pick. (Mass.) 47.

In many of the States the legal title is treated as being in the mortgagor until after foreclosure. *Kansas Life Ass'n v. Cook*, 20 Kan. 19; *Wager v. Stone*, 36 Mich. 364; *Harley v. Estes*, 6 Neb. 386; *Jackson v. Lodge*, 36 Cal. 28. The mortgage being a mere security for the debt. *State v. Laval*, 4 McCord (S. C.), 336; *Cheever v. R. R. Co.*, 39 Vt. 336; *Benton v. Bailey*, 50 Vt. 137; *Morris v. Bacon*, 123 Mass. 58; *Sea Ins. Co. v. Stebbins*, 8 Paige, Ct. (N. Y.) 565; *Lovett v. Church*, 9 How. Pr. (N. Y.) 226.

In most of the States the mortgagor is entitled to the possession of the estate, and may rent the same and claim all the rents until the mortgagee enters for a breach of the condition. In Vermont, in *Walker v. King*, 44 Vt. 601, it was held that a mortgagee who has never taken possession under his mortgage, but has permitted the assignee of the mortgagor to remain in possession, has no greater claim against him for rents and profits than he would have against the mortgagor; and it is well settled that he has no claim upon the mortgagor therefor, either at law or in equity. *Ex parte Wilson*, 2 V. & B. 252; *Hill v. Bexley*, 20 Beav. 127; *Walmsley v. Milen*, 7 C. B. n. s. 115; *Moss v. Gallimore*, 1 Doug. 283; *Trent v. Hunt*, 9 Exch. 14; *Joly v. Arbuthnot*, 28 L. J. Ch. 547. In Georgia, the mortgagor is entitled to all the rents and profits of the land until he is sold out and dispossessed by foreclosure proceedings.

Vason v. Ball, 56 Ga. 268. In Kentucky, unless the rents and profits are specially pledged, the same rule prevails, and the mortgagee cannot claim them as a legal incident of the estate. But a court of equity *may, after the debt becomes due*, if the property is inadequate to secure the debt, in an action to foreclose the mortgage appoint a receiver of the rents. But if there is no deficiency, they go to the mortgagor. *Douglass v. Cline*, 12 Bush (Ky.), 608. In Mississippi, the mortgagor retains the legal title *and right of possession* until condition broken, and the mortgagee cannot interfere therewith, nor can the mortgagee take the rents and profits, unless so agreed. *Myers v. Estell*, 48 Miss. 373; *Black v. Payne*, 52 Miss. 271. In North Carolina the mortgagor is treated as having an equitable freehold. *State v. Ragland*, 75 N. C. 12. In Tennessee, the mortgage to the extent of the mortgage debt is *pro tanto* a sale, giving the mortgagee all the rights of a *bona fide* purchaser. 2 Tenn. Ch. 531. So in Iowa, *Hewitt v. Rankin*, 41 Iowa, 35. In Vermont, *after condition broken*, he may enter and take possession without previous notice, if he can do so peacefully. *Fuller v. Eddy*, 49 Vt. 11. So in Maine, he may enter and harvest the crops unless the mortgagor is occupying by agreement as tenant. *Gilman v. Wills*, 66 Me. 271. In Pennsylvania, the mortgagee is treated as having the title and right of possession to hold until payment, and may enter and hold the lands and receive the rents until the mortgage debt is paid. *Tryon v. Musson*, 77 Penn. St. 250. These conflicting doctrines are all of them, however, only applicable to ordinary mortgages, and the parties may, by special provision, entirely change the respective rights of the parties under the mortgage. *Carpenter v. Bowen*, 42 Miss. 28; *Trimm v. Marsh*, 54 N. Y. 599; *Fletcher v. Holmes*, 32 Ind. 497; *Buchanan v. Monroe*, 22 Tex. 537; *Williams v. Beard*, 1 S. C. 309; *Johnson v. Houston*, 47 Mo. 227; *White v. Rittmeyer*, 30 Iowa, 268; *Fletcher v. Holmes*, 32 Ind. 497; *Elfe v. Cole*, 26 Ga. 197; *Mack v. Witzler*, 39 Cal. 247; *Priest v. Wheelock*, 58 Ill. 114.

Although in form a conveyance in fee upon condition, yet in effect, even after condition broken, a mortgage is a mere security for a debt, and the title reverts without a reconveyance, whenever the debt is paid: *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; and, before foreclosure, is not subject to levy and sale. *Buckley v. Daley*, 45 Miss. 338. And until condition broken the mortgagor is entitled to possession, unless otherwise provided in the mortgage, and is in by right and by virtue of his title, and not as a tenant by sufferance. *Hooper v. Wilson*, 12 Vt. 695; *Crippin v. Morrison*, 13 Mich. 23; *Kidd v. Temple*, 22 Cal. 255. And if a mortgagee takes a lease of the mortgagor of the same lands, he will be treated as holding under the lease, until he has made his election to hold under the mortgage. *Wood v. Felton*, 9 Pick. (Mass.) 171. And after condition broken he may hold under his mortgage without first surrendering possession under the lease. *Shields v. Lozear*, 34 N. J. L. 496. The mortgagor's interest is an estate of inheritance in no wise affected by the

mortgage, before entry and foreclosure. *White v. Rittmeyer*, 80 Iowa, 268. See *Miner v. Beekman*, 11 Abb. Pr. n. s. (N. Y.) 147; *Norcross v. Norcross*, 105 Mass. 265; *O'Dougherty v. Felt*, 65 Barb. (N. Y.) 220. And even after the debt is due, he is not entitled to the rents and profits unless the security is insufficient. *Myers v. Estell*, 48 Miss. 373. As to the nature of mortgagor's estate, see *Kline v. McGuerkin*, 24 N. J. Eq. 411; *Hill v. Hewitt*, 35 Iowa, 563; *Trimm v. Marsh*, 54 N. Y. 599; *Annapolis, &c. R. R. Co. v. Gault*, 39 Md. 115. The mortgage is but a security, and the freehold still remains in the mortgagor. *Jackson v. Willard*, 4 Johns. (N. Y.) 41. He is seized, and is the legal owner. *Orr v. Hadley*, 36 N. H. 575; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534. The mortgagee, before condition broken at least, has no estate in the land distinct from the debt. *Aymar v. Bill*, 5 Johns. Ch. 570. When out of possession he cannot be treated as the proprietor of the estate. *Norwich v. Hubbard*, 22 Conn. 587. It is only a security, and the mortgagor has the same rights to the estate that he ever had, except against the mortgagee. *Wilkins v. French*, 20 Me. 111; *Orr v. Hadley*, 36 N. H. 575. And as against him, until he has legally entered for condition broken. *Kennett v. Plummer*, 28 Mo. 142. Under foreclosure proceedings, or as a judgment of a court of law, or by the consent of the mortgagor. *Hooper v. Wilson*, 12 Vt. 695; *Crippen v. Morrison*, 13 Mich. 23; *Pierce v. Brown*, 24 Vt. 195; *Hill v. Robertson*, 24 Miss. 368; *Pratt v. Skolfield*, 45 Me. 386.

Lord MANSFIELD, in *The King v. St. Michaels*, 2 Doug. 631, very clearly defines the relations of the mortgagor and mortgagee to the lands. He says: "A mortgagor in possession gains a settlement, because the mortgage, notwithstanding the form, is but a chattel, and is only security. It is an affront to common sense to say that the mortgagor is not the real owner." In an earlier case, *Martin v. Weston*, 2 Burr. 978, he thus defines the interest covered by a mortgage: "A mortgage," says he, "is a charge upon the land. And whatever would give the money, will carry the estate in the land along with it, to any purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executors; it will pass by will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it will draw the land after it as a consequence. Nay, it would do it, though the debt was forgiven only by parol." In *Eaton v. Jaques*, 2 Doug. 455, a term for years was assigned by way of mortgage with a clause of redemption, and it was held by the court that the lessor could not sue the mortgagee as assignee of all the estate, right, title, interest, &c., of the mortgagor *even after the mortgage had been forfeited, unless the mortgagee had taken actual possession*. See also, to same effect, *Walker v. Reeves*, 2 Doug. 461, note 1. In *The King v. Eddington*, 1 East, 288, it was held that the object of a mortgage is merely to secure a debt, and that the legal estate still remains in the mortgagor;

and it was held also that the husband of a woman who had an estate in a term for ninety-nine years, but which had been by her and her first husband mortgaged to secure a loan, gained a settlement by a residence upon the estate for forty days, under a statute which enabled a person owning a freehold estate in a parish, who resided upon it for the period of forty days, to acquire a settlement therein; and the court adopted a rule, as stated by Lord MANSFIELD, in *The King v. St. Michael's*, *ante*. See opinion of GROSE, J. The legal estate of the mortgagor is not divested by condition broken or entry therefor by the mortgagee, but he retains such an estate therein that it may be levied upon and sold under execution. *Trimm v. Marsh*, 54 N. Y. 599; *Gorham v. Arnold*, 22 Mich. 247. But *contra*, see *Buckley v. Daley*, 45 Miss. 338. In *Kennett v. Plummer*, 58 Mo. 142, it was held that until after condition broken and entry by the mortgagee, the mortgagor continues owner, and may lease the estate, and in every respect deal with it as owner.

Where a lease is made *after* the mortgage becomes a lien upon the estate, the mortgagor cannot, unless the tenant chooses to attorn to him, and does so, treat him as his tenant under the lease from the mortgagor, and recover the rent of him; because there is, in such a case, no legal privity. *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Partington v. Woodcock*, 5 N. & M. 672; *Watts v. Coffin*, 11 Johns. (N. Y.) 495; *Rogers v. Humphreys*, 4 Ad. & El. 299. And no reversionary interest therein vests in the mortgagee by virtue of the mortgage. *Partington v. Woodcock*, 5 N. & M. 672. And, there being no privity of contract, he cannot proceed against the lessee either by action or distress for the rent, as such. *Peters v. Elkins*, 14 Ohio, 344; *McKircher v. Hawley*, 16 Johns. (N. Y.) 289. But as the tenant of the mortgagor can take no better title than his lessor had: *Rogers v. Moore*, 11 Conn. 553; and, as after condition broken in some States: *Pierce v. Brown*, 24 Vt. 165; *McKinn v. Mason*, 3 Md. Ch. 186; *Pratt v. Skolfield*, 45 Me. 386; *Hill v. Robertson*, 24 Miss. 368; and, after condition broken and the right of the mortgagee to possession is perfected under foreclosure or other legal proceedings, in other States, the mortgagor becomes a mere tenant by sufferance to the mortgagee, it follows that the tenant occupies the same position: *Tucker v. Keeler*, 4 Vt. 161; *Hooper v. Wilson*, 11 id. 695; *Crippen v. Morrison*, 13 Mich. 23; *Kidd v. Temple*, 22 Cal. 255. And the mortgagee may immediately dispossess him without previous notice to quit. *Keech v. Hall*, 1 Doug. 21; *Thunder v. Belcher*, 3 East, 449. These cases proceed upon the ground that, in the absence of any agreement to the contrary in the mortgage, the mortgagee at once becomes entitled to possession as against the mortgagor, and that the mortgagor *instantly*, upon the delivery of the deed, becomes a mere tenant by sufferance, and consequently cannot make a tenant under him as against any one except himself and those having no better rights to the possession, and this doctrine has in effect been held in several of the States. *Shute v.*

Grimes, 7 Blackf. (Ind.) 1; Brown v. Stewart, 1 Md. Ch. 87; Fay v. Cheney, 14 Pick. (Mass.) 390; Furbish v. Goodwin, 29 N. H. 321; Walcap v. McKinney, 10 Mo. 229; Colman v. Packard, 16 Mass. 39; McKinn v. Mason, 3 Md. Ch. 186. He can make no lease or contract respecting the mortgaged premises that shall be effectual to bind the mortgagee. Sweetzer v. Lowell, 33 Me. 446; Cotton v. Smith, 11 Pick. (Mass.) 311; Judd v. Woodruff, 2 Kent Com. 298. And either the mortgagor or a tenant under him under a lease subsequent to the mortgage may be treated by the mortgagee as a tenant at will, or as a trespasser. Pettingill v. Evans, 5 N. H. 54. But, if the mortgagor reserves the right to remain in possession until after default made, the mortgagee cannot treat him as a tenant and recover for use and occupation. Mayo v. Shattuck, 14 Pick. (Mass.) 525; McKinn v. Mason, 3 Md. Ch. 186.

But the doctrine that the mortgagee is entitled to immediate possession of the premises, upon the delivery of the mortgage, was predicated upon the theory that the mortgage conveyed the legal estate in the premises to the mortgagee, and that the mortgagor had only an equitable estate therein; but this doctrine is now generally ignored in most of the States, and the mortgagor is held to retain both the legal and equitable estate until after condition broken. Carpenter v. Bowen, 42 Miss. 28; Fletcher v. Holmes, 32 Ind. 497; Pease v. Pital Knob Iron Co., 49 Mo. 124; Mack v. Wetzler, 39 Cal. 247; Priest v. Wheelock, 58 Ill. 114; Wilkins v. French, 20 Me. 111; Ellison v. Daniels, 11 N. H. 274; Hitchcock v. Harrington, 6 Johns. (N. Y.) 295; Hooper v. Wilson, 12 Vt. 695. And in those States where this doctrine is held, as well as in those in which by statute the mortgagor is given the right of possession until after foreclosure and sale, or after the expiration of the decree, where a term of redemption is given: Shaw v. Hoadley, 8 Blackf. (Ind.) 165; Tucker v. Keeler, 4 Vt. 161; the mortgagor may make a lease of the premises that will be valid and binding against the mortgagee, at least until condition broken. Crippen v. Morrison, 13 Mich. 23; Ladue v. Detroit, &c. R. R. Co., 13 id. 380; Hooper v. Wilson, 12 Vt. 695; Elf v. Cole, 26 Ga. 197; Kidd v. Temple, 22 Cal. 255. And in those States where the mortgagor's right of entry does not attach until after the expiration of the term of redemption, until the decree obtained in foreclosure proceedings has expired: Hooper v. Wilson, *ante*; Kidd v. Temple, *ante*, if the tenant or mortgagor remains in possession *after* the decree has expired, he is not liable for rent, unless there is an express or implied promise to pay it, but is a mere tenant by sufferance. Tucker v. Keeler, 4 Vt. 161. Great confusion exists in the decisions of the courts of this country, as well as of the English courts, as to what the real relations of the mortgagor and mortgagee are to the lands covered by the mortgage; but this matter in many of the States is regulated by statute, and the question in a given case can only be determined by reference to the statute of the State in which the land lies, and by the language of the mortgage itself. One thing, however,

is certain, that the tenant of the mortgagor, holding under a lease made subsequent to the mortgage, may retain possession as against the mortgagee or any person claiming under or through him, so long as the mortgagor has any right of possession left to him in the premises, and the rights of the tenant in this respect are to be tested by the rights of the mortgagor.

If, however, the mortgagee has treated a tenant of the mortgagor as a tenant at will under him, and the tenant assents to such relation: *Sweitzer v. Lowell*, 33 Me. 446; *Colton v. Smith*, 11 Pick. (Mass.) 311; *Pettin-gill v. Evans*, 5 N. H. 54; or if the mortgagee was privy to the making of the lease by the mortgagor and assented thereto, expressly or impliedly, or has recognized him as *his* tenant in such a manner that he is estopped from denying the validity of the tenancy, he cannot dispossess the tenant without the requisite notice to quit, nor unless the mortgagor might do so. If a mortgagee has received rent from the tenant of the mortgagor *as rent*, he cannot afterwards repudiate the tenancy, but such receipt of rent by him will be a good defence to an action of ejectment. *Bowman v. Lewis*, 13 M. & W. 241; *Whittaker v. Hales*, 7 Bing. 322. This question arose under the following circumstances: In the case in question, *the attorney for the mortgagee, who was also attorney for the mortgagor*, applied to the occupier of the land *for rent to pay the interest of the mortgage with*, and threatened to distrain if the rent was not paid. It also appeared that he had received the *rent* from the defendant *four or five times*. He paid the money to the mortgagee to the extent of his interest. The court held that this was an acknowledgment by the mortgagee that the defendant was not a trespasser, and therefore that he could not have been such upon the day of the demise. The plaintiff was accordingly nonsuited, and this ruling was sustained upon hearing by the court *in banco*. The principle established by this case seems to be that there cannot be a trespass where there has been a *permitted and recognized* occupation. *Foley v. Wilson*, 11 East, 56. Where the mortgagee, knowing that a person is in possession of the mortgaged premises as tenant to the mortgagor, demands and receives from him out of the rents due to the mortgagor the interest upon his mortgage, or where he receives money from him "*eo nomine* as interest, the tenant being required to pay it to him instead of rent to the mortgagor:" TINDAL, C. J., in *Whittaker v. Hales*, *ante*, there is no doubt that he is estopped from treating the tenant as a trespasser. But although the mortgagee has permitted the mortgagor to remain in possession, and has regularly received from him the interest accruing upon the mortgage, this fact does not establish the relation of landlord and tenant between the mortgagor and mortgagee, or estop the mortgagee from maintaining ejectment or trespass against a tenant of the mortgagor, or against the mortgagor himself. *Rogers v. Cadwallader*, 2 B. & Ad. 473. The case of *Partridge v. Bere*, 5 B. & Ald. 604, is sometimes cited as opposed to this doctrine; but there is no conflict between the doctrine of this and

the case last cited. In that case an action was brought by the mortgagee against the defendant for diverting a water-course. It was objected that the relation of landlord and tenant did not exist between a mortgagor and mortgagee. It was also shown that the mortgagor had regularly paid the interest, but this latter point does not seem to have been regarded by the court. It was held by the court that the mortgagor was in possession as tenant by sufferance, and consequently that he was a tenant in the strictest sense. But, notwithstanding the loose talk of judges and of law-writers, to the effect that the mortgagee is tenant to the mortgagor, or is his agent, *it is clear that the mortgagor in possession is not a tenant at all.* He is in possession as of right and under a legal and equitable title, until after default made; and such is now the doctrine held by the English courts. *Hickman v. Machin*, 7 H. & N. 722. *If the mortgagor is entitled to possession*, as he is, after condition broken at least, according to the doctrine of our courts, except when provision is otherwise made by statute, there would seem to be no question but that from the time when the mortgagee's right of entry accrues he may undoubtedly treat the mortgagor as a trespasser, or as a tenant, at his election. *Pettingill v. Evans*, 5 N. H. 54. But before entry by the mortgagee, the law will not imply a promise on the part of the mortgagor to pay rent. *Mayo v. Shattuck*, 14 Pick. (Mass.) 525. Nor until such election is made, can the mortgagor be treated as a tenant. *McKinn v. Mason*, 3 Md. Ch. 186. And unless entry is made by the mortgagee, or action brought to recover possession within the periods provided by law, his right will be barred. *Lord v. Morris*, 18 Cal. 482; *Haskell v. Bailey*, 22 Conn. 569. But this rule does not apply if the mortgagee is in possession, although he has not brought foreclosure proceedings to perfect his right within the statutory period: *Hall v. Fuller*, 7 Vt. 106; and in equity, unless the statute clearly applies to this class of securities, will foreclosure be barred by the statute. *Union, &c. Co. v. Murphy*, 22 Cal. 620; *Michigan Ins. Co. v. Brown*, 11 Mich. 265.

NOTE 21. Principal and Surety.—The contract of a surety is accessory to that of the principal; consequently any admissions made by the principal, affecting the validity of the original contract as to himself, is binding upon the surety so long as his contract is in force. *Monton v. Beauchamp*, 10 La. An. 666; *Evan v. Kreeland*, 9 Ala. 42; *United States v. Cutter*, 2 Curtis (U. S.), 617.

But this rule cannot be extended beyond the validity of the contract as to the principal, and the rights of the surety cannot be affected by any statements or admissions of the principal as to status of the surety, or his rights or liabilities as such, and, as the contract is usually without consideration, and merely as an accommodation to the principal, it will not be extended beyond its strict technical import. *Bank v. Barrington*, 3 N. J. L. 27; *New Orleans, &c. Co. v. Hogan*, 1 La. An. 62. The law

favours the surety, but not to the extent that it will construe the contract one way as to the principal and another way as to the surety. *Pelzer v. Steadman*, 22 S. C. 279.

Private arrangements entered into between the principal and the surety affecting his liability have no effect upon the liability of the latter, unless notice or knowledge of such arrangement is brought home to the party to whom the contract or obligation is given. Thus, where a person signs a note, bond, or other obligation, under an agreement that it shall not be delivered until a certain other person has also signed it, it is binding upon the surety although delivered without the signature of such person, unless the promisee knew or had notice of the condition. *Melletts v. Parker*, 2 Met. (Ky.) 608; *Merriam v. Rockwood*, 47 N. H. 81; *Smith v. Moherley*, 10 B. Mon. (Ky.) 266; *Blackwell v. State*, 26 Ind. 204; *Deardorff v. Forseman*, 24 Ind. 481; *State v. Miller*, 3 Gill (Md.), 335; *Singer Manuf. Co. v. Drummond*, 40 Hun (N. Y.), 260; *s. p. Mathias v. Morgan*, 72 Ga. 517; *Lyttle v. Cozad*, 21 W. Va. 183; *Mowbray v. State*, 88 Ind. 324.

But if the payee or obligee understood or had notice or knowledge of the fact that the instrument was signed by the surety upon condition that another should also sign, the surety is not bound if the obligation is delivered without the signature of such other person. *Hill v. Sweetzer*, 5 N. H. 168; *Easter v. Minard*, 26 Ill. 494; *Bivins v. Helsey*, 4 Met. (Ky.) 278; *York, &c. Ins. Co. v. Brooks*, 51 Me. 506; *Garvin v. Mobley*, 1 Bush (Ky.), 48; *Perry v. Patterson*, 5 Humph. (Tenn.) 134; *Read v. McLemore*, 34 Miss. 110; *Gaff v. Bankston*, 35 Miss. 518. In *United States v. O'Neil*, 19 Fed. Rep. 567, it appeared that after a bond had been signed by two sureties with the understanding between them and the obligor and obligee that it was to be signed by a third surety whose name was in the bond, the name of the third surety was altered in the body of the instrument, with the knowledge of the obligee, by the substitution of a different surety, who then signed the bond, — *held* that the two sureties were discharged. There is a class of cases in which it is held that a bond, perfect on its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. *Dair v. United States*, 16 Wall. (U. S.) 1; *Tidball v. Halley*, 48 Cal. 610; *State v. Peck*, 58 Me. 284; *Cutler v. Roberts*, 7 Neb. 4; *Nash v. Fugate*, 24 Grat. (Va.) 202; *Millett v. Parker*, 2 Met. (Ky.) 608; *State ex rel. v. Pepper*, 31 Ind. 76. Then there are other cases in which it has been decided that if a bond be written as if to be executed by two or three or more sureties, and it is in fact executed by

only one, and is then delivered to the obligee, it is valid and effectual against that one. *Cutler v. Whittemore*, 10 Mass. 442. See also *Russell v. Freer*, 56 N. Y. 67. In *Smith v. United States*, 2 Wall. (U. S.) 219, Mr. Justice CLIFFORD states the rule to be that any variation in the agreement to which the surety has subscribed which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he has subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni*, for the obvious reason that, until such condition has been complied with, no completed contract exists. But where the payee is ignorant of this arrangement, the surety having made it possible for the principal to deliver the instrument, as perfect, and to obtain credit upon its faith, upon the principle that he who has made the fraud possible shall bear the burden, the surety is held responsible.

If the surety signs the instrument in blank, he is liable thereon, although the blanks were filled without his knowledge or authority, and for a different sum and upon different terms from those agreed upon between him and the principal. *Rhea v. Gibson*, 10 Gratt. (Va.) 215; *White v. Duggan*, 140 Mass. 18.

Sureties are as much bound by the true intent of an instrument as the principal: *Roth v. Miller*, 15 S. & R. (Penn.) 100, and may, except in special instances, avail themselves of any defences which the principal may set up. If the instrument is void, he is not bound as surety, although at the time when he signed the instrument he believed it to be valid. *Evans v. Hoey*, 1 Bay (S. C.), 13. Nor is he liable if the contract is tainted with fraud, or if his signature thereto was obtained by fraud. *Causey v. Wiley*, 27 Ga. 444.

The doctrine of strict construction applies to contracts of sureties, and they are never held responsible beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are not allowed to enlarge or in any degree change or alter their legal obligation. *Chase v. McDonald*, 7 H. & J. (Md.) 160; *Brooks v. Brooks*, 12 G. & J. (Md.) 306; *Henderson v. Marvin*, 31 Barb. (N. Y.) 397; *Linch v. Litchfield*, 16 Ill. App. 49; *Leggett v. Humphries*, 21 How. (U. S.) 66; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Walsh v. Bailie*, 10 Johns. (N. Y.) 180; *W. W. Kimball Co. v. Baker*, 62 Wis. 526; *Raney v. Barron*, 1 Fla. 327; *Blair v. Ins. Co.*, 10 Mo. 559; *Field v. Rawlings*, 6 Ill. 581; *Bank v. Cole*, 39 Me. 188; *Frost v. Mixsell*, 38 N. J. Eq. 586; *Delo v. Banks*, 101 Penn. St. 458; *Streeper v. Victor Sewing Machine Co.*, 112 U. S. 676; *Missoula Co. Comm'rs v. McCormick*, 4 Mont. 115; *Foud du Lac v. Moore*, 58 Wis. 170; *Victor Sewing Machine Co. v. Crookwell*, 3 Utah, 152; *Northwestern Bank v. Keen*, 14 Phila. (Penn.) 7; *Webster County v. Hutchinson*, 60 Iowa, 721; *State v. Orr*, 12 Lea (Tenn.), 725; *Wood v. Fisk*, 63 N. Y. 245; *Thomson v. McGregor*, 81 N. Y. 592; *Belloni v. Freeborn*, 63 N. Y. 383; *Ward v. Stahl*, 81 N. Y. 406; *Knowles v. Cuddeback*, 19

Hun (N. Y.), 590; *Gates v. McGee*, 13 N. Y. 232; *Rochester Bank v. Elwood*, 21 N. Y. 88; *Fairlie v. Lawson*, 5 Cow. (N. Y.) 424; *John Hancock Mutual Life Ins. Co. v. Loewenberg*, 14 Weekly Dig. (N. Y.) 326; *Jennery v. Olmstead*, 90 N. Y. 363; *Bank v. Lang*, 87 N. Y. 209; *Crist v. Burlingame*, 62 Barb. (N. Y.) 357; *McCluskey v. Cromwell*, 11 N. Y. 393; *Sheldon v. Sabin*, 4 Civ. Proc. Rep. (N. Y.) 4; *Mayor, &c. v. Kelly*, 17 Weekly Dig. (N. Y.) 525; *Petty v. Sherwood*, 17 id. 82; *Delaware, Lackawanna, &c. R. R. Co. v. Burkhard*, 36 Hun (N. Y.), 57; *Merchants' National Bank v. Hall*, 83 N. Y. 388; *Evansville National Bank v. Kaufman*, 93 N. Y. 273; *Davis v. Copeland*, 67 N. Y. 127; *Barnes v. Barrow*, 61 N. Y. 39; *Pratt v. Matthews*, 24 Hun (N. Y.), 387; *People v. Vilas*, 36 N. Y. 460.

"Nothing can be clearer," says STORY, J., in *Miller v. Stewart*, 9 Wheat. (U. S.) 681, "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. *To the extent, and in the manner, and under the circumstances pointed out in his obligation*, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. *He has a right to stand upon the very terms of his contract*; and if he does not assent to any variation of it, and a variation is made, it is fatal." See also *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *McMicken v. Webb*, 6 How. (U. S.) 292. In *Lafayette v. James*, 92 Ind. 240, it appeared that some time before the year 1876 the city erected water-works to supply water for public and private use. Up to June, 1876, the city managed the works chiefly through a committee, called a Committee on Water Works. On the 29th day of May, 1876, the common council of the city passed a resolution to go into an election for a superintendent for the water-works, and thereupon elected appellee, James, as such superintendent. This was the only legislation of any kind, either by way of resolution, ordinance, or by-law, that had been had by the city council at the time of the passage of the above resolution and election of James, and up to a time which was subsequent to the approval of the bond in suit. The bond is in due form, payable to the city of Lafayette, and conditioned for the payment of \$2,000. The condition of the bond is as follows: "The conditions of the above obligation are, that should the above bound Dundy A. James honestly and faithfully discharge his duties as superintendent of the Lafayette Water Works; and pay over all moneys that may come into his hands as such superintendent, then this obligation shall be void; else in full force and effect." The bond bears date the 1st day of June, 1876, and was signed by James, principal, and the other obligees as sureties. On June 5th, James submitted the bond, and it was approved by the common council of the city. At the time the bond was executed and approved, there was no by-law, resolution, or ordinance, or any other legislation requiring the superintendent of water-works or James to give any bond whatever. At the

same session at which the bond was approved, the common council adopted "rules and regulations for the government and protection of the Lafayette water-works, together with the tariff of water rates."

Sections two and three are as follows : —

"Sec. 2. There shall be appointed one man who shall be the general executive officer or superintendent of the water-works, and he shall give bond in the sum of two thousand dollars, conditioned for the faithful discharge of his duty. It shall be the duty of said superintendent to see that the by-laws and resolutions of the common council are executed; that the conditions of all contracts by or with said works are faithfully complied with; that the assessment of water rents are duly made, collected, and paid into the city treasury; to credit all accounts and claims, and submit the same to the common council, with such explanations as to enable them to act advisedly thereon; and to have a general supervision over all the operations and interests of said works, and keep the council informed as to the condition of the works, with such suggestions as he may deem necessary for the interests of the same; and make monthly, quarterly, semi-annual and annual reports of the condition and operation of said water-works, with such other duties as the common council may prescribe.

"Sec. 3. Said superintendent shall also have special supervision of the reservoir, reservoir-grounds, and lake thereon, to see that no depredations or misdemeanors are committed either on the grounds, reservoir, or lake."

Other sections prescribe additional duties of the superintendent.

After the adoption of these rules and regulations, the common council did not elect a superintendent, nor did they re-elect James, nor require a new bond of him. From that time forward until 1879 he acted as such superintendent under his election, collected water rents; but failed to pay over to the city \$1,533.70 of the money he had collected.

Are his sureties liable on the bond for the water rents thus collected and not paid over? That is the question for decision.

The power to construct the water-works, at the time they were constructed, was given by Section 53 of the act of March, 1867, 1 R. S. 1876, 291. There was nothing in that act, nor in any act subsequent and prior to the appointment of James, providing for the appointment of a superintendent of water-works as a city officer. James then was not an officer of the city, nor was his bond an official bond in the sense in which that term is used in Section 5,528, R. S. 1881, which provides that official bonds shall be obligatory upon the sureties for the faithful discharge of additional duties imposed upon the principal by law. The common council, we think, had the right to employ James as an agent or superintendent in the management of the water-works, and to accept the bond from him, as was done. That bond, we think, is obligatory upon the sureties for all non-feasance and malfeasance of James in the

discharge of the duties which devolved upon him by his appointment as superintendent.

The important questions to settle are, What were those duties? Did the common council, by the adoption of the rules and regulations, add other and different duties? If so, are the sureties upon the bond liable for the defalcation of James while discharging those duties?

The law is too well settled to admit of discussion,—that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissimi juris*. *Markland, &c. Co. v. Kimmel*, 87 Ind. 560; *Stull v. Hance*, 62 Ill. 52; *Lang v. Pike*, 27 Ohio St. 498; *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 1; *United States v. Boyd*, 15 Pet. 187; *McCluskey v. Cromwell*, 11 N. Y. 593; *Noyes v. Granger*, 51 Iowa, 227; *Home Savings Bank v. Traule*, 6 Mo. App. 221; *Pybus v. Gibb*, 38 Eng. L. & Eq. 57. . . . “If that be so, we are quite clear in our opinion that the sureties are not liable for any defalcation growing out of such collection. The collection of such rents was not included in the original engagement and undertaking. It is not only an additional duty, but a duty of an entirely different character. The sureties might have been willing to answer for the non-feasance or malfeasance of James as a superintendent of the water-works, in the discharge of the duties as fixed and understood when the bond was executed, but entirely unwilling to answer for possible defalcation in the handling of large sums of money. They may have had faith in him as a superintendent in the proper sense of that term, but no faith at all in his capability or trustworthiness in the collection and handling of water rents. We think that the additional and different duty of collecting water rents, and the additional peril to the sureties incident thereto, are beyond the engagement of the sureties, and that hence they are not liable for the defalcation.” *People v. Pennock*, 60 N. Y. 421; *Manufacturers' Nat. Bank v. Dickerson*, 41 N. J. L. 448; *White Sewing Machine Co. v. Mullins*, 41 Mich. 339; *Mumford v. M. & C. R. R. Co.*, 2 Lea (Tenn.), 393.

But sureties for the faithful performance by a person of certain duties are not discharged from liability because other duties were also imposed upon the person for whose acts they became responsible, unless the liability sought to be enforced resulted from the performance of the other duties. In *Home Savings Bank v. Traule*, 75 Mo. 199, the defendants were sureties for the faithful performance of the duties of a book-keeper of a bank. During his service the plaintiff also used him as teller, in which capacity he received and paid out moneys of the plaintiff. The referee found “that the ordinary duties of the book-keeper of a bank do not require him to handle or have charge of any money, and that the ordinary duties of a teller of a bank require him to handle all the money,—in other words, that as book-keeper he handled no

money of plaintiff, while as teller he handled it all; and that as teller he was afforded opportunities and exposed to temptations to take and appropriate to himself the moneys of plaintiff, which were not afforded him as book-keeper; but that his latter employment did afford him facilities for hiding his defalcations as teller by false entries in the books. I find also that the duties of a bank's teller are much more responsible, and a larger bond is required of him than in case of the book-keeper. The losses sustained by the plaintiff by reason of the errors and misconduct of the principal consist of losses by his act as book-keeper, and losses by his act as book-keeper and teller."

The losses which the plaintiff suffered by reason of the principal's misconduct as book-keeper, and on account of which judgment was rendered for the plaintiff by the Circuit Court, resulted from his failure to enter upon the books by which plaintiff settled with his customers, divers sums of money properly paid out by him as teller, and duly entered on the teller's books, whereby the bank paid said sums a second time. It was held that the sureties were liable.

In *Mayor v. Kelly*, 98 N. Y. 467, the defendant became surety for the faithful performance of a book-keeper's duties in the department of docks in the city of New York. The book-keeper was required also to assist the treasurer in receiving and depositing the department funds, and he embezzled by means of false entries or omissions to make entries. It was conceded that the additional duties did not hinder his faithful performance of the duties of book-keeper. *Held*, that the question of damages was for the jury. In *Detroit Savings Bank v. Zeigler*, 49 Mich. 157, A. gave a bond with sureties for the faithful performance of his duties as receiving teller in a bank. During the temporary absence of the general teller A. was appointed by the cashier to perform his duties. While so employed he embezzled funds of the bank which came into his hands. It was held that the sureties on his bond were liable, though the money did not come into his possession as receiving teller. *Paw Paw v. Eggleston*, 25 Mich. 36, 40; *Detroit v. Weber*, 29 id. 24; *Johnston v. Kimball*, 39 id. 187; *Bullock v. Taylor*, id. 137; *United States v. Boyd*, 15 Pet. (U. S.) 187; *State v. Cutting*, 2 Ohio St. 1; *McCluskey v. Cromwell*, 11 N. Y. 593; *Urmston v. State*, 73 Ind. 175. In *National Mechanics' Banking Association v. Conkling*, 90 N. Y. 116, it was held that the sureties on the bond of an officer of a bank are not bound for any default of their principal when appointed to another and more responsible office therein, under general words of liability for the faithful performance of other duties than those of the office to which he has been appointed when he shall be assigned thereto. Such an assignment must be supposed to be of a temporary character, and the recital of the bond will control the liability of the sureties under a permanent change in the duties of their principal to a more responsible position. Here the recital was "of such book-keeper as aforesaid, or whilst engaged in any other office, duty, or

employment, relative to the business thereof." EARL, J., said: "The recital in the conditions of the bond shows that the principal had been appointed to the office of book-keeper; that he had accepted that office and consented to perform the duties thereof. That was the office brought to the attention of the sureties, and which they had in mind when they executed the bond. The recital in such bonds, undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key; and so it has been held in many cases. In *London Assurance Co. v. Bold*, 6 Q. B. 514, WIGHTMAN, J., said: 'In truth the recital is the proper key to the meaning of the condition.' In *Hassell v. Long*, 2 M. & S. 370, ELLENBOROUGH, C. J., said that the words of the recital of a bond afforded the best ground for gathering the meaning of the parties. In *Pearsall v. Summersett*, 4 Taunt. 593, it was held, as expressed in the head note, that 'the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate.' See *Peppin v. Cooper*, 2 B. & A. 431; *Barker v. Parker*, 1 T. R. 287; *Liverpool Waterworks Co. v. Atkinson*, 6 East, 507; *Tradesmen's Bank v. Woodward*, Anthon N. P. (N. Y.) 300. Here the sureties undertook for the fidelity of their principal only while he was book-keeper; but if while book-keeper the duties of any other office, trust, or employment relating to the business of the bank were assigned to him, their obligation was also to extend to the discharge of those duties. While book-keeper he might temporarily act as teller, or discharge the duties of any other officer during his temporary illness or absence, or he might discharge any other special duty assigned to him, and while he was thus engaged the bank was to have the protection of the bond. There are no words binding the sureties in case of the appointment of their principal to any other office. They might have been willing to be bound for him while he was book-keeper, or temporarily assigned to the discharge of other duties, but yet not willing to be bound if he should be appointed teller or cashier, and as such, placed in the possession or control of all the funds of the bank. This is a case where the general words subsequently used must be controlled and limited by the recital. A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris*, and must not be extended by construction. His contract must be construed by the same rules which are used in the construction of other contracts. The extent of his obligation must be determined from the language used, read in the light of the circumstances surrounding the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety, and protect him against a liability not strictly within the precise terms of his contract." *Ludlow v. Simond*, 2 Cai. Cas. 1; *Crist v. Burlingame*, 62 Barb. (N. Y.) 351;

McCluskey v. Cromwell, 11 N. Y. 593; *Gates v. McKee*, 13 id. 232; *Rochester City Bank v. Elwood*, 21 id. 88; *Pybus v. Gibb*, 38 Eng. L. & Eq. 57; *Skillett v. Fletcher*, L. R. 26 P. 469.

A surety on a bond is never liable beyond the penalty of the bond. *Briggs v. Cramer*, 5 N. J. L. 498; *Clark v. Bush*, 3 Cow. (N. Y.) 151; *Fairlie v. Lawson*, 5 id. 424; *Rayner v. Clark*, 7 Barb. (N. Y.) 581. Therefore, where a surety is sued on an appeal bond he has a right to pay into court the amount of the penalty and costs and have the proceedings stayed. *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63. He is not to be holden beyond the precise terms of his contract, and except in certain cases of accident, mistake, or fraud, equity will not charge him beyond his liability at law. *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1.

If a stranger pays the amount due on a bond to the obligee, at the request of the principal obligor, such request will not inure as the request of a surety on the bond, so as to raise an implied assumpsit by him in favor of the person paying the bond. *Elmendorph v. Tappén*, 5 Johns. (N. Y.) 176. In *Bank of St. Albans v. Smith*, 30 Vt. 148, a surety, known to be such by the payee, upon a note payable at a fixed time, and left by the principal with the payee, with an agreement between them, of which the surety had no knowledge, that it should stand as collateral security not only for the principal's debts to the payee then existing, but also for those that might subsequently accrue, was held not liable upon the note to the payee, when the latter's only claim was for a loan to the principal made after the maturity of the note, notwithstanding it was expressly agreed between the principal and the payee that the note should stand as security for the loan.

A creditor is entitled to the benefit of all pledges or securities given to or in the hands of a surety of the debtor for his indemnity, whether the surety is damnified or not, as it is a trust created for the better security of the debt, and attaches to it. *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866; *Roberts v. Colvin*, 3 Gratt. (Va.) 358; *Branch Bank v. Robertson*, 19 Ala. 798; *Owens v. Miller*, 29 Md. 144; *Van Orden v. Durham*, 35 Cal. 136; *Bibb v. Martin*, 22 Miss. (14 Smed. & M. 3) 87; *Haven v. Foley*, 18 Mo. 136; *Vail v. Foster*, 3 N. Y. (3 Comst.) 312; *Green v. Dodge*, 6 Ohio, 80; *Kramer's Appeal*, 37 Pa. St. 71. But this substitution or subrogation gives him no higher right; and the right of the surety must be tried by the instrument which creates it. *Bush v. Stamps*, 26 Miss. 463.

The payee of a note is entitled to the benefit of any counter security given for the indemnity of an indorser; as is also a party to whom the debt evidenced by the note is transferred with consent of such indorser. Thus, where the payee of a note, indorsed by one who holds counter security, accepts the note of a third party, and transfers to him, with the consent of the indorser, the debt evidenced by the original note, this substituted creditor will be entitled to the benefit of the counter security,

though the agreement may have been that the original note was to be delivered to the indorser; and equity will protect this security to such substituted creditor against a subsequent incumbrancer, though the note was not assigned to him. *Haven v. Foley*, 18 Mo. 632.

Where a principal confesses a judgment in favor of his surety to indemnify him as such, and the surety sells property of the principal under such judgment, and takes the notes of the purchasers in payment, he will be considered in equity as holding them in trust for the holder of the note on which he is surety; and such trust will follow them into the hands of third persons who take them in payment of pre-existing debts of the surety, though without notice of the trust, where they do not relinquish any security or right for such transfer. So, where a bank discounts such notes, and applies them to debts due by the surety to the bank, but without relinquishing any security or property, or where they are taken in payment of a judgment, but the judgment has not been discharged, and it does not appear that the judgment creditor has, in consequence, relinquished any lien or security.

And where the surety is entitled to a part of such notes for his own benefit, and has transferred them all, a person who holds a part cannot assume that he holds those belonging to the surety individually. The holder stands in the same position as to the beneficiary as the surety himself.

Where a surety obtains a mortgage from the principal debtor to secure him against his liability, and also to secure a debt due to himself, the creditor is entitled to the benefit of the mortgage, and to be paid out of the first proceeds, in preference to the surety himself, or his assignees under an assignment for the benefit of his creditors. *Ten Eyck v. Holmes*, 3 Sandf. Ch. (N. Y.) 428. And a mortgage given to a surety to indemnify him against loss will pass to a third person who paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him. *Brien v. Smith*, 9 Watts & S. (Pa.) 78.

The taking of a mortgage by the surety from the principal debtor, conditioned to pay the note and save him harmless, creates a trust and an equitable lien on the land for the benefit of the creditor, and equity will compel the surety to give the creditor the benefit of such lien; and if the surety assigns the mortgage for this purpose, the effect is the same as if the assignment had been made under a decree in chancery. *Paris v. Hulett*, 26 Vt. 308.

If a surety has been compelled to pay money, or has given property to satisfy the debt for his principal, he is entitled to be reimbursed therefor, and the law implies the requisite promise to uphold the action. *Ward v. Henry*, 5 Conn. 596; *Hulett v. Soullard*, 26 Vt. 295; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Hassinger v. Solms*, 5 S. & R. (Penn.) 8; *Gray v. Bowles*, 1 D. & B. L. (N. C.) 437; *Bonny v. Seeley*, 2 Wend.

(N. Y.) 481; *Randall v. Rich*, 11 Mass. 498; *Ainslee v. Rich*, 7 Cow. (N. Y.) 662. But he has no right of action until he has satisfied the principal debt, either by actual payment, or otherwise relieving the principal from all liability therefor. *Ponder v. Carter*, 12 Ired. L. (N. C.) 242; *Bonham v. Galloway*, 13 Ill. 68; *Hodges v. Armstrong*, 3 Dev. L. (N. C.) 253; *Walker v. McKay*, 2 Met. (Ky.) 204; *Shepherd v. Ogden*, 3 Ill. 257; *Lord v. Staples*, 23 N. H. 448. But he can recover no more than he pays, and if the whole debt is released by his paying a part only, he can only recover the part paid. *Bonny v. Seeley*, 2 Wend. (N. Y.) 481. Or, if he pays in property or depreciated currency, he is only entitled to the actual value thereof: *Crozier v. Grayson*, 4 J. J. Mar. (Ky.) 514; *Hall v. Creswell*, 12 G. & J. (Md.) 36; *Jordan v. Adams*, 7 Ark. 348; *Lord v. Staples*, 23 N. H. 448; not exceeding the amount of the debt: *Hickman v. McCurdy*, 7 J. J. Mar. (Ky.) 555; and his reasonable expenses. *Hayden v. Cabot*, 17 Mass. 169; *Wynn v. Brook*, 5 Rawle (Penn.), 106. A co-surety who pays the debt, in seeking to recover the amount of the principal or contribution from his co-surety, is entitled to be subrogated to the rights of the creditor in respect to the dignity of the claim. *Lidderdale v. Robinson*, 2 Brock. (U. S.) 159.

A surety is entitled to the benefit of all the securities for the debt which are available for his indemnity, and a person taking any of such securities from the principal debtor, with notice of his responsibilities, is bound in equity to hold them for the indemnity of the surety, and is subject to all the equities which the surety could originally enforce. *Atwood v. Vincent*, 17 Conn. 575; *Loehr v. Colburn*, 92 Ind. 24; *Cowgill v. Linville*, 20 Mo. App. 138; *Taylor v. Lau*, 84 Mo. 420; *Rubey v. Watson*, 20 Mo. App. 428; *Ray v. Proffett*, 15 Lea (Tenn.), 517; *Lochenmeyer v. Forgarty*, 112 Ill. 572; *Fawcetts v. Kimmey*, 33 Ala. 261; *Belcher v. Hartford Bank*, 15 Conn. 381; *Jones v. Tincker*, 15 Ind. 308; *Scott v. Featherston*, 5 La. An. 313; *Stanwood v. Clampitt*, 23 Miss. 371; *Dozier v. Lewis*, 27 Miss. 679; *Arnot v. Woodburn*, 35 Mo. 99; *Sears v. Laforce*, 17 Iowa, 473; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Denny v. Lyons*, 38 Penn. St. 98; *Allen v. Powell*, 108 Ill. 484; *Kinnard v. Baird*, 20 S. C. 177; *Rice v. Rice*, 108 Ill. 109; *Johnson v. Amana Lodge*, 92 Ind. 150; *Tolle v. Boeckeller*, 12 Mo. App. 54; *Henry v. Compton*, 2 Head (Tenn.), 549; *Kirkman v. Bank of America*, 2 Coldw. (Tenn.) 397; *James v. Jacques*, 26 Tex. 321; *Watts v. Kinney*, 3 Leigh (Va.), 272; *Boyd v. Myers*, 12 Lea (Tenn.), 175; *Schoonover v. Allen*, 40 Ark. 132; *Somers v. Johnson*, 57 Vt. 274; *Fairchild v. Lynch*, 99 N. Y. 359. Unless, by taking a new security, or otherwise, he has waived the right. *Watts v. Eufala Bank*, 76 Ala. 474. On paying the debt he is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal debtor. *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Erb's Appeal*, 3 N. J. L. 296; *McDowell v. Bank of Wilmington, &c.*, 1 Harr. (Del.) 367; *Tatum v. Tatum*,

1 Ired. Eq. (N. C.) 113; Lownds v. Chisholm, 2 McCord Ch. (S. C.) 455; Perkins v. Kershaw, 1 Hill Ch. (S. C.) 344; Foster v. Trustees, &c., 3 Ala. 302; Cullum v. Emanuel, 1 Ala. 23; Rodes v. Crockett, 2 Yerg. (Tenn.) 346; Wade v. Green, 3 Humph. (Tenn.) 547; Colvin v. Owens, 22 Ala. 782; United States Bank v. Uniston, 2 Brock. (U. S.) 252; Houston v. Branch Bank, 25 Ala. 250; Lampkin v. Mills, 4 Ga. 343; Storms v. Storms, 3 Bush (Ky.), 77; Irick v. Black, 17 N. J. Eq. 189; Barnes v. Morris, 4 Ired. Eq. (N. C.) 22; Greiner's Estate, 2 Watts (Penn.), 414; Womwell's Appeal, 7 Watts & S. (Penn.) 805; Smith v. Swain, 7 Rich Eq. (S. C.) 112; Eppes v. Randolph, 2 Call (Va.), 125; Hill v. Mansur, 11 Gratt. (Va.) 522. And after the debt has become due the surety may resort to a court of equity, in some cases, to compel the principal to pay the debt. Thus, in Moore v. Topliff, 107 Ill. 241, three partners, A., B., and C., executed their firm notes to C., who indorsed the same, and the firm paid interest thereon until A. withdrew from the firm, B. & C. taking all the assets and assuming all liabilities. It was held that as between themselves, upon this state of facts, B. & C. became principal debtors, and A. surety, upon the notes. SHELDON, J., said: "It is a well settled principle in equity that a surety, upon paying the debt to the principal, is entitled to be substituted in the place of the creditor as to all securities held by the latter for the debt, and to have the same benefit that he would have therein. 1 Story Eq. Jur. § 327; Warner v. Beardsley, 8 Wend. (N. Y.) 199; Lewis v. Palmer, 28 N. Y. 275; Marsh v. Pike, 1 Sandf. Ch. (N. Y.) 210; Webster v. French, 11 Ill. 275; Barnard v. Cushman, 85 id. 452; Snyder v. Spaulding, 57 id. 488. A surety, after the debt has become due, may, without making payment himself, come into a court of equity and compel the principal to pay the debt." Hale v. Wetmore, 4 Ohio St. 600; Tankersley v. Anderson, 4 Desaus. Eq. (S. C.) 44; City of Keokuk v. Love, 31 Iowa, 199.

A surety who has paid a judgment which appears to be dormant, against himself and his principal, is entitled to an order giving him the control of such judgment and the execution issued thereon, for the purpose of testing his right to use the same for remuneration by his principal. Davenport v. Hardeman, 5 Ga. 580. But if he pays the amount of an execution issued against the principal, upon a judgment obtained against him upon the principal debt, such payment operates as a satisfaction of the execution, and it cannot be kept on foot for his benefit. Morrison v. Marvin, 6 Ala. 797; Carr v. Glasscock, 3 Gratt. (Va.) 343; Armstrong's Appeal, 5 W. & S. (Penn.) 352; McKee v. Amonett, 6 La. An. 207; Lathrop's Appeal, 1 Penn. St. 512. To bring a case within this well settled principle of equity, it must be shown that, at the time the surety paid the debt, the creditor had a valid and subsisting lien or equity, such as a court of equity would have enforced at his instance for the satisfaction of this debt. Havens v. Foudry, 4 Met. (Ky.) 247. And it takes place of right, for the benefit of him who, being himself a creditor, pays another

creditor, whose claim is preferable to his by reason of his privileges or mortgages. *Spiller v. Creditors*, 16 La. An. 292.

A surety who has become chargeable by reason of the forfeiture of a contract, or its non-performance by his principal in the manner or at the time agreed upon, may, instead of discharging the obligation and thus becoming entitled by substitution to all the remedies possessed by the creditor, coerce the creditor to proceed against the debtor by application to a court of equity. *Sassacer v. Young*, 6 G. & J. (Md.) 243. If he pays the debt, and takes a conveyance of all the creditor's interest in land mortgaged to secure it, he becomes, by substitution, in effect the mortgagee for the security of his advances; and the debt and mortgage pass by a residuary clause, in his will. *Dearborn v. Taylor*, 18 N. H. 153. But this doctrine of subrogation does not apply to a surety of a surety, though the latter is compelled to pay the creditor, nor can he be so substituted, even though such debtor has paid his immediate surety. *Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

Where a mortgagee has a lien on two funds, one of which is mortgaged to a junior mortgagee, on the prior mortgagee's exhausting the latter fund, the junior mortgagee will be subrogated to the other fund. *Hunt v. Townsend*, 4 Sandf. Ch. (N. Y.) 510. This right of subrogation to the securities held by the creditor, on the payment of the debt, does not depend upon any contract or request by the principal debtor, but rests upon principles of justice and equity. *Mathews v. Aiken*, 1 N. Y. 595.

Where there are two or more sureties, they are bound to contribute equally to the debt they have jointly undertaken to pay. *McDonald v. Magruder*, 3 Pet. (U. S.) 470. The right of contribution among sureties is founded in natural justice and the equitable principle of equality of burden and benefit, rather than upon contract. If one of a number of sureties discharges the common burden, the others are bound to contribute equally to his relief, in the event of the insolvency of the principal; and if any of them are insolvent, their shares must be apportioned among those who are solvent. These principles are well settled. *Preston v. Preston*, 4 Gratt. (Va.) 88; *Wayland v. Tucker*, id. 267; *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 120; *John v. Jones*, 16 Ala. 454; *Tyns v. De Jarnette*, 26 Ala. 280; *Whitman v. Gaddy*, 7 B. Mon. (Ky.) 591; *Johnson v. Johnson*, 11 Mass. 359; *Aiken v. Peay*, 5 Strobb. (S. C.) 15. That the surety has this right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal, would seem to be settled in our courts, although the rule seems to be otherwise in England. *Powell v. White*, 11 Leigh (Va.), 309; *Enders v. Brune*, 4 Rand. (Va.) 438. The rule of substitution, for the purpose of enforcing contribution among co-sureties, is not different. One surety who pays the common debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the prin-

principal debtor. *Horton v. Bond*, 28 Gratt. (Va.) 815, 825; *Lidderdale v. Robinson*, 12 Wheat. 594; *Robertson v. Triggs*, 31 Gratt. (Va.) 465. If the note is secured by a deed of trust, payment by the surety operates as an assignment of the note and deed, and he may foreclose it. *Taylor v. Tarr*, 84 Mo. 420.

If one surety pays the entire debt he may sue the others for contribution. *Batchelder v. Fiske*, 17 Mass. 464; *Lidderdale v. Robinson*, 2 Brock. (U. S.) 160; *Mitchell v. Sprawl*, 5 J. J. Mar. (Ky.) 270; *Crowdus v. Shelby*, 6 id. 62; *Paulin v. Kagin*, 29 N. J. L. 480; *Stothoff v. Dunham*, 19 id. 181; *Smith v. Hicks*, 5 Wend. (N.Y.) 48; *Samuel v. Zachary*, 4 Ired. L. (N. C.) 377; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Norton v. Coons*, 6 N. Y. 33; *Leaman v. Sample*, 91 Ind. 236; *Baldwin v. Fleming*, 90 id. 177; *Aldrich v. Aldrich*, 56 Vt. 324; *Rynearson v. Turner*, 52 Mich. 7; *Van Winkle v. Johnson*, 11 Oreg. 469; *Stewart v. Golden*, 52 Mich. 143; *Briggs v. Hinton*, 14 Lea (Tenn.), 233; *Hoyt v. Tuthill*, 33 Hun (N. Y.), 196; *Boughner v. Hall*, 24 W. Va. 249; *Jeffries v. Ferguson*, 86 Mo. 244; *Strather v. Mitchell*, 80 Va. 149; *Pinkerton v. Taliafero*, 9 Ala. 547; *Wells v. Miller*, 66 N. Y. 255; *Morgan v. Smith*, 70 N. Y. 537; *Waldorf v. Fingar*, 5 Weekly Dig. (N. Y.) 112; *Clark v. Myers*, 11 Hun (N. Y.), 608; *Weed v. Calkins*, 24 Hun (N. Y.), 582; *Easterly v. Barber*, 66 N. Y. 433; *Cornes v. Wilkin*, 14 Hun (N. Y.), 428; *Shaeffer v. Clendennin*, 100 Penn. St. 565; *Whiteman v. Harriman*, 85 Ind. 49; *Young v. Shunk*, 30 Minn. 503; *Johnson v. Harvey*, 84 N. Y. 363; *Alderson v. Mendes*, 16 Nev. 298; *Backus v. Coyne*, 45 Mich. 584; *Stephens v. Meek*, 6 Lea (Tenn.), 226; *Riley v. Rhea*, 5 id. 115; *Drummond v. Yaeger*, 10 Ill. App. 380; *McClelland v. Davis*, 4 Lea (Tenn.), 97; *Reeves v. Pullian*, 9 Baxt. (Tenn.) 153; *Burnett v. Millsaps*, 59 Miss. 333; *Jenkins v. Lockard*, 66 Ala. 561; *Nally v. Lang*, 56 Md. 567; *Broughton v. Wimberly*, 65 Ala. 549; *Craven v. Freeman*, 82 N. C. 361; *Dinkgrave's Succession*, 31 La. An. 70; *Calvert v. Peebles*, 82 N. C. 334; *Robertson v. Trigg*, 32 Gratt. (Va.) 76; *Byers v. Alcorn*, 6 Ill. App. 39; *Taylor v. Reynolds*, 53 Cal. 686; *Bright v. Lemon*, 83 N. C. 183; *Wagonseller v. Prettyman*, 7 Ill. App. 192; *Smith v. Hudson*, 50 Wis. 279; *Hichborn v. Fletcher*, 66 Me. 209; *Sinclair v. Reddington*, 56 N. H. 146.

But this rule only applies when there is a legal obligation to pay, resting upon the surety paying the debt and those whom he seeks to make contribute: *Skrainka v. Rohan*, 18 Mo. App. 340; *Ernst v. Nau*, 63 Wis. 134; *Long v. Miller*, 93 N. C. 227; *Stockmeyer v. Oerling*, 35 La. An. 467; *Lurby v. Carr*, 60 Md. 192; *Glasscock v. Hamilton*, 62 Tex. 143; *Cooke v. Hoffman*, 5 Lea (Tenn.), 105; and only extends to the balance, over and above what may have been received by the surety from securities placed in his hands by the principal, or otherwise. *Boughner v. Hall*, 24 W. Va. 249. And if he is completely indemnified by the principal, he cannot maintain the action. *Morrison v. Taylor*, 21 Ala. 779; *Ramsey v. Lewis*, 30 Barb. (N. Y.) 403; *Goodloe v. Clay*, 6 B. Mon. (Ky.) 236. If he has

only paid his proportion of the debt he has no remedy except against the principal.

The surety of a surety, or one who becomes so by request of the other surety, is not liable to contribution. *Prince v. Edwards*, 11 Mo. 526; *Knox v. Valandingham*, 13 S. & M. (Miss.) 526; *Byers v. McClanahan*, 6 G. & J. (Md.) 250. A surety cannot recover of a co-surety, unless he show that the principal is unable to pay. *Poignard v. Vernon*, 1 T. B. Mon. (Ky.) 47; *Pearson v. Duckham*, 3 Litt. (Ky.) 386; *Daniel v. Ballard*, 2 Dana (Ky.), 296. See also, *Caldwell v. Roberts*, 1 Dana (Ky.), 255; *Stone v. Buckner*, 20 Miss. 73. *Allen v. Wood*, 3 Ired. Eq. (N. C.) 386. A surety may be discharged from his liability as such by a discharge of his co-surety by an act or omission of the creditor. *Jones v. Whitehead*, 4 Ga. 397; *Toomer v. Dickerson*, 37 Ga. 428. By a substitution of parties without his consent. *McKay v. McDonald*, 5 Ala. 388; *Turner v. Nance*, 5 id. 712; *Granite Bank v. Ellis*, 43 Me. 367. By a satisfaction of the debt or obligation by the principal. *Chapman v. Collins*, 12 Cush. (Mass.), 163; *Merrimac Bank v. Parker*, 7 Pick. (Mass.) 88. Or by a discharge or release of the principal debtor. *Blackburn v. Beall*, 21 Md. 208; *Dodd v. Winn*, 27 Mo. 501; *Bridges v. Phillips*, 17 Tex. 128. Otherwise than by operation of law. *McBroom v. The Governor*, 6 Port. (Ala.) 32; *Jones v. Hagler*, 6 Jones L. (N. C.) 542. An alteration, without his consent, of the terms of the obligation, will discharge a surety, whether he is injured or benefited thereby. *St. Albans Bank v. Dillon*, 30 Vt. 122; *Brigham v. Wentworth*, 11 Cush. (Mass.) 123; *Taylor v. Johnson*, 17 Ga. 521; *Mayhew v. Boyd*, 5 Md. 102; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Bethune v. Dozier*, 10 Ga. 235; *United States v. Tillotson*, 1 Paine (U. S.), 305; *Steele v. Boyd*, 6 Leigh (Va.), 517; *Batchelder v. White*, 80 Va. 103; *Robinson v. Berryman*, 22 Mo. App. 509; *Walla Walla County v. Ping*, 1 Wash. Terr. 339; *Singer Manuf. Co. v. Hibbs*, 21 Mo. App. 574; *Jackson v. Boyles*, 64 Iowa, 428; *Peoples Ins. Co. v. McDonnell*, 41 Ohio St. 650; *United States v. O'Neil*, 19 Fed. Rep. 567; *Jones v. Bangs*, 40 Ohio St. 149. But this is dependent upon the circumstance whether the fact that he was a surety was known to the creditor. *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Agnew v. Merrett*, 10 Minn. 308.

Of course any *material* alteration of the contract, after it is signed by the surety, made without his knowledge or assent, avoids the contract, regardless of the question whether the creditor knew that he occupied the relation of surety or not.

If there has been such an alteration as destroys the identity of the contract: *Hewins v. Cargill*, 67 Me. 554; *Wade v. Withington*, 1 Allen (Mass.), 561; *Belknap v. Bank*, 100 Mass. 376; *Corn v. Emigrants' Savings Bank*, 98 id. 12; or as makes its terms more onerous to the surety, he is discharged by the alteration. The rule is, that if the creditor makes an agreement with the principal debtor, or does any act

which is prejudicial to the surety, the latter is discharged from his liability: *Cambridge Savings Bank v. Hyde*, 131 Mass. 77; as, if he upon a sufficient consideration extends the time of payment: *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; *Bank v. Bishop*, 6 Gray (Mass.), 317. But the reason for this rule is, that the act of the creditor is injurious to the surety; and it would seem to follow that if the change in the original contract from its nature is *beneficial* to the surety, or if it is self-evident that it cannot prejudice him, the surety will not be discharged. *Smith v. United States*, 2 Wall. (U. S.) 219; *Appleton v. Parker*, 15 Gray (Mass.), 273. Under this rule, it was held in *Cambridge Savings Bank v. Hyde*, 131 Mass. 77, that a memorandum made on the back of a note by the holder, in pursuance of an agreement with the maker, but without the knowledge of the surety, that the rate of interest after a specified day will be *less* than that provided in the note, was not such an alteration as would discharge the surety.

If, however, there is a change in the contract which makes the surety assume that relation for a new principal, or for a person to whom he has not consented to stand in that relation, he is discharged from liability; as, if the surety became so for an individual member of a firm, and without his consent the name of the firm was substituted as the principal obligors. *Haskell v. Champion*, 30 Mo. 136. But obtaining an additional surety to the note will not discharge the surety, although done without his knowledge: *Ward v. Hackett*, 30 Minn. 150; *Snyder v. Van Doren*, 42 Wis. 602; *Miller v. Finley*, 26 Mich. 249; *Crandall v. Bank*, 61 Ind. 349; *Card v. Miller*, 1 Hun (N. Y.), 504; but holding a contrary doctrine, see *McVean v. Scott*, 46 Barb. (N. Y.) 379; *Hall v. McHenry*, 19 Iowa, 521.

“The rule that a material alteration of a contract avoids it,” says MITCHELL, J., in *Ward v. Hackett*, *ante*, “had its origin largely in the necessity of preserving and protecting the integrity and sanctity of contracts. Properly applied, the rule is a salutary one; but the general sentiment of courts now is that the doctrine has been extended quite far enough, and that formerly, especially in England, it has been carried too far, and applied to cases not within the mischief intended to be prevented. Therefore the tendency now is, if not to restrict, at least not to extend it beyond what has been already decided. To hold that the obtaining of an additional surety to a note would discharge the first surety, would in our judgment be harsh, technical, and work injustice, and establish a doctrine contrary to the general understanding of business men, which ought to be the law of such cases, and is the only just basis of the implied contract resulting from the facts.

“In dealing with commercial paper complete on its face and signed by several parties, we apprehend, it never occurs to a business man that it is incumbent upon him to inquire of each maker whether he understood when he signed the paper just what other parties were to sign with him, or whether any other names have been subsequently added without his

knowledge or consent. To require any such thing would be inconvenient, without reason, and an innovation upon business usages. The idea that when a person signs a note as surety and delivers it to his principal no other surety is to be obtained, and if the note cannot be negotiated in that form it cannot be used at all unless all the parties consent to the introduction of a new surety, is, we apprehend, contrary to the general understanding of the commercial world."

It seems to be the rule, at least as against an innocent holder, that the principal obligor to whom the paper has been intrusted has implied authority to obtain additional sureties until the note is launched into the market by delivery to the payee, and that this common understanding is a great basis of the implied contract resulting from the facts. The surety is not prejudiced by such an act, as his burden, in case he is called upon to pay, is lessened rather than increased by the introduction of additional sureties; and no reason, either in law or morals, exists, why by such an act a surety should be absolved from liability. *Keith v. Goodwin*, 31 Vt. 268; *Ganeuer v. Lagou*, 43 Ill. 134; *Sampson v. Barnard*, 98 Mass. 359; *State v. Dunn*, 11 La. An. 549.

Of course the same rules apply to an alteration of a written contract, in the case of a surety, as apply to any other party; and any alteration thereof which is *material* discharges the surety.

In *Cronkhite v. Nebeker*, 81 Ind. 319, a change made by the payee of a note perfect on its face, making it payable at a certain bank, was held such a change as rendered the note invalid in the hands of an innocent holder, even though the maker unintentionally left a blank in the note sufficient for the writing in of the name of the bank.

In that case the note was negotiated, and in an action to recover the amount due thereon the plaintiff had judgment. But upon appeal this judgment was reversed, Woods, J., saying:—

"The appellant, who was at the time a man of intelligence and able to read both written and printed matter with ease, executed a promissory note of the tenor following, which he read, to wit:—

§75.

September 6th, 1877.

Twelve months after date I promise to pay to the order of G. H. Fitzmaurice, at Covington, Indiana, seventy-five dollars, value received, without any relief from valuation or appraisement laws, with interest at ten per cent per annum from date, and ten per cent attorney's fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note.

LEVI A. CRONKHITE.

"The note was prepared by the payee upon an ordinary printed blank, which was so arranged that there was one line in the blank in which there was no printed word except the word 'at,' printed at the left-

hand end of the line; and beginning about the middle of said line there were written the words, 'Covington, Ind.,' leaving a space sufficient, between the word 'at' and the word 'Covington,' to insert the words, 'The Farmer's Bank,' in a handwriting corresponding with the written parts of the note.

"At the time of making the note the appellant objected to its being made payable at a bank, and thereupon the words 'Covington, Ind.' were written in by the payee, who filled up the written parts of the instrument with pen and ink which he carried with him. After the execution of the note by the appellant, and without his knowledge or consent, Fitzmaurice inserted the words, 'The Farmer's Bank,' in such a manner as not to indicate an alteration of the note after its execution, and in that condition indorsed it before maturity to the appellee, who paid value therefor without notice or intimation of the alteration. In support of the decision of the Circuit Court, the following cases are cited. *Marshall v. Drescher*, 68 Ind. 359; *Gothrump v. Williamson*, 61 id. 599; *Cornell v. Nebeker*, 58 id. 425; *Spitler v. James*, 32 id. 202. In these cases the following are referred to: *Hereth v. Merchant's National Bank*, 34 Ind. 380; *Nebeker v. Cutsinger*, 48 id. 436; *Riley v. Schwacker*, 50 id. 592; *Steele v. Moore*, 54 id. 52; *Woolen v. Ulrich*, 64 id. 120; *Noll v. Smith*, 64 id. 511; *Gerrard v. Hadden*, 67 Penn. St. 8; *Zimmermann v. Rate*, 75 id. 188; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573.

"In *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 313, the note read, when executed, 'payable at——Bank, at Frankfort.' The alteration consisted in filling the blank so as to designate a particular bank. It was held that the holder of the note had implied authority to fill the blank in that way. The following extracts from the opinion in that case are pertinent to the present discussion:—

"'The insertion of the name of the bank in Frankfort, where the same was payable, was a material alteration, and rendered the note void unless the payee was authorized to fill the blank by inserting the name of the bank. *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Nazro v. Fuller*, 24 id. 374.

"'We proceed to inquire whether the payee of a negotiable promissory note is authorized to insert the name of the bank where the same has been left blank.

"'The maker of a promissory note stands upon the footing of an acceptor of a bill of exchange. *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Chitty on Bills*, 100–103; *Byles on Bills*, 173–177.

"'In our opinion, the rule is well settled, that if a person indorses or signs in blank paper or note and intrusts it to another that he may raise money upon it, he authorizes that other person to fill all blanks which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. *Holland v. Hatch*,

11 Ind. 497; *Spitler v. James*, 32 id. 202, and the authorities there cited. It is quite obvious to us, not only from the face of the note, but from the evidence of the appellee, that the maker of the note in question intended to make the same negotiable and governed by the law merchant. If the parties had intended to make an ordinary promissory note, and it had been complete as such when it was delivered to the payee, such payee would not have been authorized to insert words rendering it negotiable; and if there had been no blank in the note, and such words had been interlined, such interlineation would have put a purchaser upon inquiry. The note, when delivered, was not perfect and complete as a negotiable instrument governed by the law merchant. The payee had the right to make it perfect and complete by inserting the name of the bank where it was to be payable.'

"The case in the record before us is in some respects essentially different. The note as executed was a perfect non-negotiable note. No words were wanting in order to give full force and effect to the words present. It was just as the maker intended it should be. It was prepared upon a printed form, and the words inserted did not fill the entire blank space, but left it possible to make an insertion of other words, which were wrongfully inserted, and when inserted made the note appear to be negotiable by the law merchant. If the word 'Covington' had been written close to the word 'at,' the words 'at the Farmers' Bank' might have been inserted after the words 'Covington, Ind.,' and so the same alteration in the character of the instrument would have been equally well accomplished.

"The exact question presented in this record is, whether the maker of a non-negotiable promissory note, perfect in its terms, by leaving a blank space in the body of the note wherein words of negotiability may be so inserted as not to furnish an indication of the alteration having been made irregularly, gives an implied authority for the making of the alteration, which, as against a *bona fide* purchaser, he may not deny.

"The case of *Marshall v. Drescher*, 68 Ind. 359, was essentially the same in its facts, and was decided upon the same ground as *Gillaspie v. Kelley*, *ante*. The cases of *Cornell v. Nebeker*, 58 Ind. 425, *Gothrump v. Williamson*, 61 id. 599, and other decisions of this court referred to in these cases, all arose upon facts quite distinguishable from those now before us.

"In the case of *Holmes v. Trumper*, 22 Mich. 427; 7 Am. Rep. 661, upon a state of facts not essentially unlike those shown in *Gillaspie v. Kelley* and *Marshall v. Drescher*, *ante*, is a vigorous discussion of the principle involved.

"We give the following extracts from the opinion in that case, which received the unanimous concurrence of the judges:—

" 'We think the courts have gone quite far enough in sustaining instruments executed in blank, and the implied authority to fill them up, and we are not disposed to take a step in advance in that direction. . . .

“The general principle that “where one of two innocent parties must suffer,” etc., upon which the plaintiff in error relies, as stated by us in *Burson v. Huntington*, 21 Mich. 415, is one which in its application is mainly confined to cases where the third person, whose act or default has occasioned the loss, has been in some sense or to some extent the agent of the party who is made to sustain the loss, or when the latter by his acts or negligence has authorized the other party to consider him as such; and in all cases (unless this is an exception) where upon the general principle relied upon a party has been held liable upon a written contract on the ground of negligence alone, without reference to such agency, he has only been held liable upon it in the shape in which he allowed it to go from his hands, and not as criminally altered by another. . . . As between the maker of commercial paper and an innocent party, acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and to get into circulation, the general principle we are discussing would preclude such maker from showing that the paper was not intended to have the effect which its appearance indicated, though as between original parties many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted he must be held by the contract indicated by the representation thus made.

“But this reasoning extends only to the paper as made by him, or as he has thereby authorized some other person to change its terms; and the note in this case being a complete legal instrument when issued, to hold him bound by the contract as altered by the forgery involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent third parties so to treat him. . . . The argument amounts simply to this: That by the maker’s awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word “at,” and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

“But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or as if the instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical

application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. The law has no scale by which to measure the various degrees of facility with which different modes of forgery may be committed, or their liability to suspicion or detection; and we see no clear and intelligible distinction by which we could hold the maker in this case bound by this forgery which would not hold all persons liable for the alteration and forgery of any paper signed by them. Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and unless perhaps where it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders.

“ ‘If promissory notes were only given by first-class business men who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people, who are not thus skilful nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper.’

“ This reasoning is in entire accord with the propositions quoted from the opinion in *Gillaspie v. Kelley*, *ante*. To the same effect, see *Worrell v. Gheen*, 39 Penn. St. 388; *Goodman v. Eastman*, 4 N. H. 455; *Bruce v. Westcott*, 3 Barb. 374; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Ivory v. Michael*, 33 id. 398; *Presbury v. Michael*, id. 542; *Wade v. Withington*, 1 Allen (Mass.), 561; *Fay v. Smith*, id. 477; *Draper v. Wood*, 112 Mass. 315; 17 Am. Rep. 92; *Wood v. Steele*, 6 Wall. (U. S.) 80; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *McGrath v. Clark*, 56 N. Y. 34; 15 Am. Rep. 372; *Hert v. Oehler*, 80 Ind. 83. See also *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357.

“ In *McGrath v. Clark*, *ante*, which is fully in point, and in its facts is even a stronger case than the one before us, it is said by CHURCH, C. J., who delivered the opinion of the court: ‘The rule that “whenever one of two innocent parties must suffer,” . . . is not applicable, for the reason that the indorser did not in any legal sense enable the maker to make the alteration;’ and in *Wood v. Steele*, *ante*, it is said to the same

point : 'The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other.'

"There are cases in actual and in seeming conflict with the foregoing; but they are in most instances cases where the notes as executed were imperfect, the unfilled blanks being in such connection with the words used as to require the insertion of other words in order to complete the instrument as executed; or they turn upon a misapplication of the maxim that 'If one of two innocent persons must suffer,' etc.; as if any man could or was bound to endeavor to protect the world against the commission of forgeries upon his obligations. If he owes the public any duty whatever in this respect, the measure of that duty must be the utmost care which in each case can reasonably be employed; and the inquiry in each case of unauthorized alteration will be, not whether the party sought to be charged made the obligation, but whether he might by greater care have so constructed the instrument which he did execute, as that an alteration of it would have been impossible or more difficult. Such a doctrine, instead of giving stability and credit to commercial paper, would lead to uncertainties quite inconsistent with the character which such paper ought and is generally supposed to bear. Besides, if the maxim referred to can apply at all, it applies as well to non-commercial as to commercial paper, and to be consistent, we should be driven to hold that the maker of a note not payable in bank is estopped, as against an innocent purchaser, from pleading an alteration made by filling blank spaces carelessly left at the time the paper was issued.

"The simple and fair rule for all is that the purchaser of paper, whether negotiable by the law merchant or not, is put upon inquiry as to the genuineness of the paper in all its material parts, by the mere fact that it is offered for sale; and if he sees fit to omit making inquiry of the maker, he buys at his own risk and upon the faith of his immediate indorser, or other parties, if any, against whom he may have recourse."

In *Lea v. Walls*, 101 Penn. St. 57, the court said: "The court below left to the jury the question whether the defendant exercised ordinary care and prudence against alterations of the note in suit. If he did, he was not liable; but if he did not, he was. It is difficult to see what error there was in this. It is precisely what we held in *Brown v. Reed*, 79 Penn. St. 370; s. c. 21 Am. Rep. 75. The present chief justice very clearly pointed out in that case the distinction between it and *Phelan v. Moss*, 67 Penn. St. 59; s. c. 5 Am. Rep. 402, and *Gerrard v. Hadden*, 67 Penn. St. 82. On page 372, he said: 'These cases do not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skilful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of

his handwriting,' and again he said: 'Whether there was negligence in the maker was clearly a question of fact for the jury.'

"In the present case, the plaintiffs are not satisfied with having the question of negligence on the part of the defendant submitted to the jury. They insist that the court should have held that the defendant was guilty of negligence, as matter of law, in not taking such precautions as would certainly have prevented the alteration of the note. The alteration consisted in adding a single letter 'y' to the word 'eight,' so as to make the note read as for eighty dollars instead of eight. The instrument was a printed blank with an open space, for the insertion of the amount, the word 'dollars' being printed at the end of the space. The word 'eight' was filled in at the beginning of the space, and all the rest of the blank to the word 'dollars' was filled with an elongated scroll. It happened that a very slight space, about an eighth of an inch, was left between the end of the word 'eight' and the beginning of the scroll. In that diminutive spot the letter 'y' was inserted in such a way as to appear quite natural. The alteration was made by the principal debtor, the defendant being the surety. There were other alterations of the note made after the surety signed it, but they are not material to be considered, since without the one we are discussing, they would have been of no avail. In these circumstances, to hold that the defendant was so palpably guilty of negligence in not taking sufficient precautions against forgery as that the jury could not be permitted to determine the question, and the court must determine it as matter of law, would be equivalent to holding that the maker of a negotiable instrument must so execute it as to prevent the possibility of alteration in any event. Such a doctrine would be monstrous and contrary to every legal principle. It has never been announced by any court, and it is scarcely credible that it ever will be. The word 'eight' is perhaps the only one that can be altered so as to express a larger sum by the addition of a single letter, and was probably selected by the forger in this case for that reason. Other words require either two letters, as 'ty' in 'sixty,' 'seventy' and 'ninety,' or an additional word. The defendant testified that when he signed the note, the scroll was in the open space on the note just as it was at the trial. The jury has found that there was no lack of ordinary care in not observing that a single letter might be added in the very small space immediately following the letter 't' in the word 'eight,' and in this we quite agree with them. In the common experience of men, very few persons write their words so closely together that a single letter cannot be added at the end of one of them without attracting attention."

Where the creditor takes a new security from the principal debtor in satisfaction of the demand, it is equivalent to payment by the party bound to indemnify. *Howe v. Buffalo, &c. R. R. Co.*, 37 N. Y. 297; *Seamans v. White*, 8 Ala. 656. But not, unless the new security is taken in lieu or discharge of the old one. *Ladd v. Wiggin*, 35 N. H. 421;

Thomas v. Cleaveland, 33 Mo. 126 ; Cruger v. Burke, 11 Tex. 694 ; Elwood v. Deifendorf, 5 Barb. (N. Y.), 598 ; Thurston v. James, 6 R. I. 103. Merely taking *additional* security does not have that effect. Shubrick v. Russell, 1 Desau. (S. C.) 315 ; Green v. Warrington, 1 id. 430 ; Austin v. Curtis, 31 Vt. 64 ; Headlee v. Jones, 43 Mo. 435 ; Remsen v. Groves, 41 N. Y. 472 ; Cary v. White, 52 N. Y. 138. But see Kane v. Cortesy, 100 N. Y. 132. Unless the time of payment is extended in consideration thereof. Bell v. Martin, 18 N. J. L. 167 ; Sparks v. Hall, 4 J. J. Marsh. (Ky.) 35 ; Hutchinson v. Woodwell, 107 Penn. St. 509.

When a creditor who has in his possession money or property of the principal debtor, which he may rightfully retain and appropriate to the satisfaction of his debt, without violating any duty or subjecting himself to an action, instead of retaining it, suffers it to pass into the hands of the principal, the surety is thereby to that extent discharged. Perrine v. Firemen's Ins. Co. 22 Ala. 575 ; Springer v. Toothaker, 43 Me. 381 ; Cummings v. Little, 45 Me. 183 ; Baker v. Briggs, 8 Pick. (Mass.) 122 ; Payne v. Commercial Bank, 14 Miss. 24 ; N. H. Savings Bank v. Colcord, 15 N. H. 119 ; Commonwealth v. Miller, 8 S. & R. (Penn.) 452 ; Neff's Appeal, 9 Watts & S. (Pa.) 36 ; Smith v. McLeod, 3 Ired. Eq. (N. C.) 390 ; Nelson v. Williams, 2 Dev. & B. Eq. (N. C.) 118 ; Griswold v. Jackson, 2 Edw. (N. Y.) 461 ; Cullum v. Emanuel, 1 Ala. 23 ; Bank of Gettysburg v. Thompson, 3 Grant Cas. (Penn.) 114 ; Everly v. Rice, 20 Penn. St. 297 ; Richards v. Commonwealth, 40 Penn. St. 146 ; Hurd v. Spencer, 40 Vt. 581. But while it is a general principle that a discharge by a creditor of sureties for a debt held by him, without the consent of the surety for the debt, discharges the surety, to the extent of the value of the securities, yet, if the creditor took such securities, under an arrangement with the debtor which binds him in good faith to discharge them, this rule does not apply, and a discharge by a creditor of sureties so held, without notice to the surety, and after the bankruptcy of the debtor, does not necessarily discharge his surety. Pearl Street Congregational Church v. Imlay, 23 Conn. 10.

By statute, in many states where a creditor is requested by a surety to sue his principal, and the creditor neglects to do so, and the principal afterwards becomes insolvent, the surety is discharged. Goodwin v. Griffin, 3 Stew. (Ala.) 160 ; Manchester Iron Co. v. Sweeting, 10 Wend. (N. Y.) 162 ; Johnston v. Thompson, 4 Watts (Penn.), 446 ; Bruce v. Edwards, 1 Stew. (Ala.) 11 ; Geddis v. Hawk, 10 S. & R. (Penn.) 33 ; Lichtenhaler v. Thompson, 13 id. 157 ; Gardiner v. Ferree, 15 id. 28. But see Pickett v. Lund, 2 Bailey (S. C.), 608 ; Hogeboom v. Herrick, 4 Vt. 131 ; Frye v. Barker, 4 Pick. (Mass.) 381 ; Dehuff v. Turbett, 3 Yeates (Penn.), 157 ; Pain v. Packard, 13 Johns. (N. Y.) 174 ; Fulton v. Matthews, 15 id. 433 ; Row v. Pulver, 1 Cow. (N. Y.) 246 ; State v. Reynolds, 8 Mo. 95 ; Herrick v. Borst, 4 Hill (N. Y.), 650 ; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123 ; Remsen v. Beekman, 25 N. Y. 552. But this right is

purely equitable, or is given by statute, and does not exist at the common law, except where the principal was solvent when the request was made, and subsequently became insolvent. *Halstead v. Brown*, 17 Ind. 202. And a mere request on the part of the surety to the creditor to proceed against the principal, will not discharge the surety. The latter has his remedy by paying the debt and proceeding against the debtor himself. *Hicock v. Farmers', &c. Bank*, 35 Vt. 476; *Manning v. Shotwell*, 5 N. J. L. 584; *Taylor v. Beck*, 13 Ill. 376; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Baldwin v. Western Reserve Bank*, 5 Ohio, 276; *Pintard v. Davis*, 21 N. J. L. 632.

A surety is not discharged by a mere forbearance or delay on the part of the creditor, without fraud or a binding agreement not to sue. *Byers v. Harris*, 67 Iowa, 685; *Williams v. Covillard*, 10 Cal. 419; *Goodwyn v. Hightower*, 30 Ga. 249; *Carr v. Howard*, 8 Blackf. (Ind.) 190; *Shook v. State*, 6 Ind. 113; *Shook v. Ripley County*, 6 Ind. 461; *Leavitt v. Savage*, 16 Me. 72; *Bailey v. Adams*, 10 N. H. 162; *Joslyn v. Smith*, 13 Vt. 353; *Payne v. Commercial Bank of Natchez*, 14 Miss. 24; *Newell v. Hamer*, 5 Miss. 684; *Nichols v. Douglass*, 8 Mo. 49; *Marks v. Bank of Missouri*, 8 id. 316; *Coman v. State*, 4 Blackf. (Ind.) 241; *Harter v. Moore*, 5 id. 367; *Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Haynes v. Covington*, 17 Miss. 470; *Anderson v. Mannon*, 7 B. Mon. (Ky.) 217; *Ford v. Beard*, 31 Mo. 459; *Sailly v. Elmore*, 2 Paige, 497; *King v. Baldwin*, 2 Johns. (N. Y.) 554; *Hoye v. Penn*, 1 Bland (Md.), 528; *Hunter v. Jett*, 4 Rand. (Va.) 103; *Morris v. Crummey*, 2 id. 323; *Burn v. Poang*, 3 Desau. (S. C.) 596; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Brinagar v. Phillips*, 1 B. Mon. (Ky.) 283; *Stout v. Ashton*, 5 T. B. Mon. (Ky.) 251; *Vilas v. Jones*, 10 Paige (N. Y.), 76; *Brubaker v. Okeson*, 36 Penn. St. 517; *Hunter v. Clark*, 28 Tex. 159; *Edwards v. Bedford Chair Co.* 41 Ohio St. 17; *Hunt v. United States*, 1 Gall. (U. S.) 32; *Naylor v. Moody*, 3 Blackf. (Ind.) 93; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Humphreys v. Crane*, 5 Cal. 173; *People v. White*, 11 Ill. 341; *Kirby v. Studebaker*, 15 Ind. 45; *Freeman's Bank v. Rollins*, 13 Me. 202; *Leavitt v. Savage*, 16 id. 72; *Montgomery v. Dillingham*, 11 Miss. 647; *Hawkins v. Ridenhour*, 13 Mo. 125; *Williams v. Townsend*, 1 Bosw. (N. Y.) 411; *Carter v. Jones*, 5 Ired. Eq. (N. C.) 196; *Johnston v. Searcy*, 4 Yerg. (Tenn.) 182. And the mere fact that the creditor delayed suing until the principal became insolvent does not necessarily discharge the surety. *Lyle v. Morse*, 24 Ill. 95.

In order to discharge the surety at law there must be an extension of the time of payment for a definite time, predicated upon a valuable consideration, which suspends the creditor's right of action upon the debt or obligation, and without the consent of the surety. *Thornton v. Dabney*, 23 Miss. 559; *Govan v. Binford*, 25 id. 151; *Clarke County v. Covington*, 26 id. 470; *Miller v. Stem*, 2 Penn. St. 286; *Parnell v. Price*, 3 Rich. (S. C.) 121; *Wadlington v. Gary*, 15 Miss. 522; *Waters v. Simpson*,

7 Ill. 570; *People v. McHatton*, id. 638; *Ashton v. Sproule*, 35 Penn. St. 492; *Henderson v. Ardery*, 36 id. 449; *Burke v. Cruger*, 8 Tex. 66; *Pilgrim v. Dykes*, 24 id. 383; *Hartman v. Redman*, 21 Mo. App. 124; *Brown v. Kirk*, 20 id. 524; *United States v. Hillegas*, 3 Wash. (U. S.) 70; *Bank of Steubenville v. Hoge*, 6 Ohio, 17; *Clippinger v. Creps*, 2 Watts (Penn.), 45; *Kennebec Bank v. Tuckerman*, 5 Me. 130; *Bank v. Woodward*, 5 N. H. 99; *Deming v. Norton*, Kirby (Conn.), 397; *Huffman v. Hurlburt*, 13 Wend. (N. Y.) 375; *Reynolds v. Ward*, 5 id. 501; *Fuller v. Milford*, 2 McLean, 74; *Hutchinson v. Moody*, 18 Me. 393; *Leavitt v. Savage*, 16 id. 72; *Greely v. Dow*, 2 Met. (Mass.) 176; *Inge v. Branch Bank*, 8 Port. (Ala.) 108; *Redman v. Deputy*, 26 Ind. 338; *Calvin v. Wiggam*, 27 id. 489; *Robinson v. Offutt*, 7 T. B Mon. (Ky.) 540; *Adle v. Metoyer*, 1 La. An. 254; *Morton v. Noble*, id. 194; *Clagett v. Salmon*, 5 G. & J. (Md.) 314; *Wright v. Bartlett*, 43 N. H. 548; *Meyer v. Lathrop*, 73 N. Y. 315; *Calvo v. Davies*, 73 N. Y. 211; *Dodd v. Dreyfuss*, 17 Hun (N. Y.), 600; *Myers v. Bank*, 75 Ill. 257; *Bank v. Pearson*, 30 Vt. 711; *Bank v. Mallett*, 34 Me. 147; *Spencer v. Spencer*, 95 N. Y. 353; *Wright v. Bartell*, 43 N. H. 548; *Murray v. Marshall*, 94 N. Y. 611; *Gifford v. Allen*, 3 Met. (Mass.) 258; *Grinan v. Platt*, 31 Barb. (N. Y.) 328; *Greene v. Bates*, 74 N. Y. 333; *Beard v. Root*, 4 Hun (N. Y.), 356; *Pomeroy v. Tanner*, 70 N. Y. 347; *Hubbard v. Gurney*, 64 N. Y. 457; *Ducker v. Rapp*, 67 N. Y. 464; *Flynn v. Mudd*, 27 Ill. 323; *Bank v. Church*, 60 N. Y. 634; *Scoville v. Landon*, 50 N. Y. 686; *Bangs v. Strong*, 4 N. Y. 315; *Fernan v. Doubleday*, 3 Laus. (N. Y.) 216; *Corielle v. Allen*, 13 Iowa, 289; *Bangs v. Strong*, 10 Paige (N. Y.), 11; *Lowman v. Yates*, 37 N. Y. 601; *Uhler v. Applegate*, 26 Penn. St. 140; *Miller v. McCan*, 7 Paige (N. Y.), 457; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Sailly v. Elmore*, 2 Paige (N. Y.), 497; *Hill v. Bull*, Gilm. (Va.) 149; *Maxwell v. Connor*, 1 Hill Ch. (S. C.) 14; *Smith v. Tunno*, 1 McCord Ch. (S. C.) 443; *Clark v. Patton*, 4 J. J. Marsh. (Ky.) 33; *Kennedy v. Gibbes*, 2 Desau. (S. C.) 380; *McCrary v. Coley*, 1 Ga. Dec. 104; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Comegys v. Booth*, 3 id. 14; *Reid v. Watts*, 4 J. J. Marsh. (Ky.) 440; *Wybrants v. Lutch*, 24 Tex. 309; *Austin v. Dorwin*, 21 Vt. 38; *Beach v. Zimmerman*, 106 Ind. 495; *Cates v. Thayer*, 93 Md. 156; *Thayer v. King*, 31 Hun (N. Y.), 437; *Green v. Lake*, 2 Mackay (D. C.), 162; *Knight v. Charter*, 22 W. Va. 422; *Glenn v. Morgan*, 23 id. 467; *Upington v. May*, 40 Ohio St. 247; *Morgan v. Thompson*, 60 Iowa, 280; *Lambert v. Shitler*, 62 id. 72; *Fay v. Tower*, 58 Wis. 286; *Dunham v. Countryman*, 66 Barb. (N. Y.) 268; *Haden v. Brown*, 18 Ala. 641; *Cox v. Mobile, &c. R. R. Co.*, 37 id. 320; Ala. Sel. Cas. 335; *Worthan v. Brewster*, 30 Ga. 112; *Warner v. Campbell*, 26 Ill. 282; *Kennedy v. Evans*, 31 id. 258; *Drew v. Drury*, id. 250; *Ward v. Stout*, 32 id. 399; *Lauman v. Nichols*, 15 Iowa, 161; *Montagne v. Mitchell*, 28 Ill. 481; *Gower v. Halloway*, 13 Iowa, 154; *Lime Rock Bank v. Mallett*, 34 Me. 547; *Chute v. Pattee*, 37 id. 102; *Dunn v. Spaulding*, 43 id. 336; *Gifford*

v. Allen, 3 Met. (Mass.) 255; *Dubuisson v. Folkes*, 30 Miss. 432; *Turrill v. Boynton*, 23 Vt. 142; *Peake v. Dorwin*, 25 id. 28; *People's Bank v. Pearsons*, 30 id. 711.

The payment of interest in advance is held in some of the States to be a good consideration for an extension. *Merchant's Ins. Co. v. Hauck*, 83 Mo. 21; *Russell v. Brown*, 21 Mo. App. 51; *Grayson's Appeal*, 108 Penn. St. 581; even though usurious, *Osborn v. Low*, 40 Ohio St. 437. But in others a contrary doctrine is held. *Teeters v. Lamborn*, 43 Ohio St. 144. Renewing a note giving additional time operates as a discharge of the surety. *Delaware, Lackawanna, &c. R. R. Co. v. Burkhard*, 36 Hun (N. Y.), 57. But in Alabama, taking the note of the principal payable one day after date and a mortgage to secure it, is held not to have that effect. *Mobile, &c. R. R. Co. v. Brewer*, 76 Ala. 135. A confession or revival of judgment is held to be a sufficient consideration for an extension, to discharge a duty. *Riddle v. Thompson*, 104 Penn. St. 330.

If however, the agreement for an extension of time is predicated upon an illegal consideration, as by an agreement to pay usurious interest: *Blazer v. Bundy*, 15 Ohio St. 57; *Camp v. Howell*, 37 Ga. 312; *Corielle v. Allen*, 13 Iowa, 289; *Draper v. Trescott*, 29 Barb. (N. Y.) 401; *Duncan v. Reed*, 8 B. Mon. (Ky.) 382; *Wood v. Newkirk*, 15 Ohio St. 205; *Kyle v. Bostick*, 10 Ala. 589; *Gilder v. Jeter*, 11 Ala. 256; *Goodhue v. Palmer*, 13 Ind. 457; *Offutt v. Glass*, 4 Bush (Ky.), 486; *Wilson v. Lanford*, 5 Humph. (Tenn.) 320; see *Tudor v. Goodhue*, 1 B. Mon. (Ky.) 322; *Payne v. Powell*, 14 Tex. 600; *Burgess v. Dewey*, 33 Vt. 618; *Brown v. Harness*, 16 Ind. 248; *Smith v. Hyde*, 36 Vt. 303; or any void agreement, the surety will not be discharged unless the money is really paid. *Hunt v. Knox*, 34 Miss. 655; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Rice v. Pollard*, 1 Tyler (Vt.), 230. Nor where the creditor reserves the right to sue at the request of the surety. *Viele v. Hoag*, 24 Vt. 46; *Prout v. Branch Bank*, 6 Ala. 309; *Bailey v. Gould*, Walk. (Mich.) 478; *Salmon v. Cloggett*, 3 Bland (Md.), 125. Nor unless the creditor knew that the surety was such. *Debury v. Adams*, 9 Yerg. (Tenn.) 52; *Howell v. Lawrenceville, &c. Co.*, 31 Ga. 663; *Nichols v. Parsons*, 6 N. H. 30; *McGee v. Metcalf*, 20 Miss. 535; *Wilson v. Foot*, 11 Met. (Ky.) 285; *Neel v. Harding*, 2 id. 247.

If time is given to the principal debtor at the instance, request, or even with the assent of the surety, the latter is not thereby discharged. *Treat v. Smith*, 54 Me. 112; *Suydam v. Vaan*, 2 McLean (U. S.), 99; *Adams v. Way*, 32 Conn. 160; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Solomon v. Gregory*, 19 N. J. L. 112; *Crutcher v. Trabue*, 5 Dana (Ky.), 80; *Gray v. Brown*, 22 Ala. 262; *Bank v. Johnson*, 9 Ala. 622; *Baldwin v. Bank*, 5 Ohio, 273; *Fowler v. Brooks*, 13 N. H. 240; *Porter v. Hodenpuy*, 9 Mich. 11.

A surety is not discharged by an extension of the time of payment, unless the creditor knew that such person stood in the relation of a surety:

Nichols v. Parsons, 6 N. H. 30; *Debury v. Adams*, 9 Yerg. (Tenn.) 52; *Huwell v. Lawrenceville, &c. Co.*, 31 Ga. 663; *Wilson v. Foot*, 11 Met. (Ky.) 285; *McGee v. Metcalf*, 20 Miss. 535; *Neel v. Harding*, 2 Met. (Ky.) 247; because, if he had a right to regard them as principals, he had a right to understand that the extension was for the benefit of both, and that neither was entitled to any equities as to the other, in the enforcement of the debt. *Woolford v. Dow*, 34 Ill. 424.

In order to have an extension of time operate as a discharge to the surety, there must, after the right of action accrued, be a suspension of the creditor's right of action, by a valid and binding agreement: *Beach v. Zimmerman*, 106 Ind. 495; *Tate v. Wymond*, 7 Blackf. (Ind.) 240; *Nicholls v. McDowell*, 14 B. Mon. (Ky.) 6; *Hunt v. Kuox*, 34 Miss. 365; *Hartman v. Redman*, 21 Mo. App. 124; for a definite period: *Gardner v. Watson*, 13 Ill. 347. A merely gratuitous promise, although kept, does not discharge the surety. Thus where the agent of the maker called on the latter to ask for further time for payment, and the agent expressed a willingness to aid the payee in the sale of land he was desirous of selling, and on this consideration the creditor consented not to press payment for some days, it was held that there was no such suspension of a right to sue, on the part of the creditor, as discharged the surety. *Draper v. Romeyr*, 18 Barb. (N. Y.) 163. See also *Shaw v. McFarlane*, 1 Ired. L. (N. C.) 216.

Staying proceedings on an execution against the principal, by direction of the creditor, without consideration, does not discharge the surety. *Humphrey v. Hitt*, 6 Gratt. (Va.) 509; *Sawyer v. Bradford*, 6 Ala. 572; *Miller v. Porter*, 5 Humph. (Tenn.) 294; *Alcock v. Hill*, 4 Leigh (Va.), 522; *Hetherington v. Bank*, 14 Ala. 68; *Stringfellow v. Williams*, 6 Dana (Ky.), 236; *Bayton v. Hamie*, 15 Ala. 309. But a discharge of a levy, by the plaintiff, without the consent of the surety, discharges the latter. *Curan v. Colbert*, 3 Ga. 239; *Boughton v. Bank*, 2 Barb. Ct. (N. Y.) 458; *State v. Hammond*, 6 G. & J. (Md.) 157; *Brown v. Riggins*, 3 Ga. 405.

The discontinuance of a suit brought by the creditor against the principal, does not release the surety; *Barney v. Clark*, 46 N. H. 514; *Bank of Montpelier v. Dixon*, 4 Vt. 587; *Concord Bank v. Rogers*, 16 N. H. 9; nor does an extension of time given to the principal, at the request, or even with the knowledge and concurrence of the surety. *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Suydam v. Vance*, 2 McLean (U. S.), 99; *Solomon v. Gregory*, 19 N. J. L. 112; *Treat v. Smith*, 54 Me. 112; *Adams v. Way*, 32 Conn. 160; *Gray v. Brown*, 22 Ala. 262; *Bank v. Johnson*, 9 Ala. 622; *Peck v. Durrett*, 9 Dana (Ky.), 486; *Bank v. Crosby*, 8 Me. 318.

NOTE 22. Valued Policies, What are; Effect of. — Except in the case of wager policies and policies issued upon the life of a person, the very foundation of all insurance is the real value of the thing insured.

The distinction between a valued and an open policy is, that in valued policies, the value of the thing insured is fixed, and in the case of a total loss the value fixed in the policy must be paid, while in the case of an open policy, even where the loss is total, the value must be proved, and if less than the sum insured only the actual value can be recovered. *Snell v. Del. Ins. Co.*, 1 Wash. (U. S. C. C.) 509; *Howell v. Cincinnati Ins. Co.*, 7 Ohio, 284. But in the case of a valued policy even, if the loss is partial, only the actual loss can be recovered. *Watson v. Ins. Co.*, 3 Wash. (U. S. C. C.) 1. Every policy upon profits is held necessarily to be valued. *Mumford v. Hulett*, 1 Johns. (N. Y.) 433. The rule relative to this class of policies is, that, as the underwriter has agreed upon the value, he is thereby estopped from going into the actual value. *Gardner v. Ins. Co.*, 2 Cranch (U. S. C. C.), 473; *Alsop v. Commercial, &c. Ins. Co.*, 1 Sumn. (U. S.) 451; *Carson v. Marine Ins. Co.*, 2 Wash. (U. S. C. C.) 468; *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *Bullard v. Roger Williams Ins. Co.*, 1 Curtis (U. S.), 148. Unless the valuation is shown to be fraudulent or erroneously excessive. *Griswold v. Ins. Co.*, 3 Blatch. (U. S. C. C.) 231. Evidence of over-valuation is not admissible unless shown to be fraudulent: *Gardner v. Ins. Co.*, *ante*; but gross over-valuation is evidence of fraud. *Sturm v. Atlantic Mut. Ins. Co.*, 6 Johns. (N. Y.) 281. The insurer may show that all the property insured was not at risk, as that a large amount expected to be put on board was not in fact shipped. *Alsop v. Commercial, &c. Ins. Co.*, 1 Sumn. (U. S.) 451. A memorandum fixing the value of foreign money does not make the policy valued. *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273.

See NOTE 26 as to Time Policies.

NOTE 23. Insurable Interest.—In order to constitute an insurable interest, it is not necessary that the assured should have any property in the thing insured, but it is sufficient if he stands in such a relation to it that he will sustain loss from its destruction. *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 163. As a factor who has a lien for advances. *Russell v. Union Ins. Co.*, 1 Wash. (U. S.) 409; *Seamans v. Loring*, 1 Mas. (U. S.) 127. Or any person having a lien on the vessel, or an interest in the nature of a lien. *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 132. And it seems that a person having a lien on goods, even though he may not have an insurable interest himself, may nevertheless insure them as agent for the owner. *Donath v. Ins. Co.*, 4 Dall. (U. S.) 463.

An interest in the profits of a voyage is insurable. *Locke v. No. Am. Ins. Co.*, 13 Mass. 61; *Fosdick v. Norwich Ins. Co.*, 3 Day (Conn.), 108; *French v. Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Hart v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 346.

Freight, that is, an interest accruing to the assured for the use of a vessel of which he is the owner, may be insured. *Riley v. Delafield*, 7 Johns. (N. Y.) 522; *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 425. The mate

of a vessel may be a freighter of goods in her and recover a loss on a ground of barratry in the mariners. *Stone v. National Ins. Co.*, 19 Pick. (Mass.) 34; *Riley v. Delafield*, *ante*; *Griswold v. N. Y., &c. Ins. Co.*, 3 Johns. (N. Y.) 321. But a charterer of a vessel, as such merely, cannot take a policy on freight, because he has no insurable interest, for, the policy being on freight generally, will not be regarded as applying to freight earned (*Cheviot v. Barker*, 2 Johns. (N. Y.) 346); nor, where the freight or benefit to accrue is less than the charter money payable by him. *Huth v. New York, &c. Ins. Co.*, 8 Bosw. (N. Y.) 588.

Consignees of goods for sale on commission who have made advances or acceptances on account thereof, may insure them to their full value. *Bank v. Bicknell*, 1 Cliff. (U. S. C. C.) 85; *Aldrich v. Ins. Co.*, 1 W. & M. (U. S.) 272. The master's right to primage on freight is an insurable interest. *Pedrick v. Fisher*, 1 Spr. (U. S. C. C.) 565. A surety for the payment of the value of the cargo in case of condemnation by a foreign court, to whom it has been delivered for indemnity, has an insurable interest. *Russell v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 409.

A person in possession under an agreement from the builder of the vessel to convey to him, has an insurable interest. *Semmes v. Marine Ins. Co.*, 2 Cranch (U. S. C. C.), 618. So has the owner, who has contracted to sell and convey her at a certain price, and the fact that part of the purchase-money has been paid does not prevent him from recovering the full value. *Stuart v. Columbian Ins. Co.*, 2 Cranch (U. S. C. C.), 442. And generally any person who stands in such a relation to the property that he, or those whom he legally represents, has an insurable interest which will uphold a policy, — as a buyer: *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Williams v. Smith*, 2 Caines (N. Y.), 13; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385; a part-owner: *Bulkley v. Derby Fishing Co.*, 1 Conn. 571; a vendor: *Stuart v. Columbian Ins. Co.*, *ante*; a vendee: *Semmes v. Marine Ins. Co.*, *ante*; a consignee: *Aldrich v. Equitable Ins. Co.*, 1 W. & M. (U. S.) 272; a mortgagor of a vessel: *Wilke v. People's F. Ins. Co.*, 19 N. Y.; a bottomry interest *eo nomine*: *Kenny v. Clarkson*, 1 Johns. (N. Y.) 384; a supercargo: *Wells v. Phila. Ins. Co.*, 9 S. & R. (Penn.) 103; *New York Ins. Co. v. Robinson*, 1 Johns. (N. Y.) 616; or a person having an equitable interest: *Oliver v. Green*, 3 Mass. 133; *Bartell v. Walter*, 13 Mass. 267.

The owner, though there is a bottomry bond on his vessel, may insure his interest generally; but the holder of the bottomry bond must insure *eo nomine*: *Kenny v. Clarkson*, 1 Johns. (N. Y.) 384; but the purchaser of a vessel on which more than her value has been taken up on bottomry, has no insurable interest. *Smith v. Williams*, 2 Caines Cas. (N. Y.) 110. And by the execution of a valid bottomry bond upon the ship, the interest of the assured ceases to that extent, in case of a total loss. *Read v. Mut. Safety Ins. Co.*, 3 Sand. (N. Y.) 54.

If the owner of the cargo voluntarily repairs the vessel, on her voyage,

he has no insurable interest in her by reason of such repairs. *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 319.

A conveyance and re-conveyance by way of mortgage does not work a termination of the mortgagee's interest, so as to avoid his policy of insurance. *Hitchcock v. North-Western Ins. Co.*, 26 N. Y. 68.

A mortgagor, with covenant for payment, and to insure for the benefit of the mortgagee, has an insurable interest, which is not destroyed by a subsequent forfeiture, for a violation of the act of Congress of 1831. *Wilkes v. People's F. Ins. Co.*, 19 N. Y. 184.

A common carrier has an insurable interest to the extent of the fair value of the goods, inasmuch as he is bound to deliver them safely, at their place of destination: *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; though carried in vessels chartered by them for that purpose: *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595; and in case of loss may recover, on proof of his special interest. *Van Natta v. Mut. Security Ins. Co.*, 2 Sand. (N. Y.) 490.

If a vessel, at the time of loss, were engaged in taking in a return cargo, which on her arrival would immediately result in a forfeiture of the ship, the owner has no insurable interest. *Fontaine v. Phoenix Ins. Co.*, 11 Johns. (N. Y.) 293.

Where A. purchased the whole of a cargo in which B. was to be interested to the extent of one third, and which was charged to him by A., and the invoice and bill of lading made out in their joint names, and B. some months afterwards directed his correspondent to place the proceeds to the credit of A., — *held*, that the latter had not an insurable interest in this one third of the cargo. *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

An insurance on profits is valid; and the assured may recover a total or average loss, according as the loss on the goods is total or partial. *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39; *Tom v. Smith*, 3 Caines (N. Y.), 245.

A charterer has no insurable interest in the freight, as such, where the charter money exceeds the benefits to accrue to him from the voyage. *Huth v. New York Mut. Ins. Co.*, 8 Bosw. (N. Y.) 538.

Where a part-owner agrees to sell his interest to his co-owner, taking a bill of sale upon the share of the latter as security, the former retains an insurable interest in the freight, whether the contract is performed or not. *Williams v. Ins. Co.*, 1 Hilt. (N. Y. C. P.) 345. Seaman's wages cannot be insured, directly or indirectly. *Icard v. Goold*, 11 Johns. (N. Y.) 279.

NOTE 24. Requisites of the Contract. — An oral contract for marine insurance is valid, and on the question as to whether it was made, evidence of a usage to make written applications is not admissible. *Kohne v. Ins. Co.*, 1 Wash. (U. S. C. C.) 93; *Commercial, &c. Ins. Co. v. Ins. Co.*, 19 How. (U. S.) 318; *Constant v. Alleghany Ins. Co.*, 3 Wall. Jr.

(U. S. C. C.); *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398. See however *Cockerell v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148.

It is usual however to have the contract expressed in a writing called a policy, and if in writing, it must express the contract between the parties. It is not however invalid because not dated. *Lee v. Mass. Ins. Co.*, 6 Mass. 208.

No precise form of words is necessary to make a contract of insurance; it is sufficient that the words used express the real intention of the parties, and show with sufficient certainty the nature of the risk which the insurer assumes, and the terms and conditions upon which it is assumed. *Scriba v. Ins. Co. of N. America*, 2 Wash. (U. S. C. C.) 107.

The courts apply to such contracts liberal rules of construction in favor of the assured, and reject as far as possible any critical strictness or technical interpretation: *Palmer v. Washington Ins. Co.*, 1 Story (U. S.), 360, and will look at the real intent and meaning of the parties, rather than the strict and literal sense of the words. *Cross v. Shurtliff*, 2 Bay (S. C.), 220. In *Grain v. Bowen*, 2 Caines Cas. (N. Y.) 30, where a policy was effected at twelve cents per pound, English pounds were held to be intended, although the weight in the invoice is French. *Union Bank v. Union Ins. Co.*, Dudley (S. C.), 171; *Henshaw v. Ins. Co.*, 2 Black (U. S.), 99.

A policy upon a ship is an insurance of the ship for the voyage, and not an insurance on the ship *and* the voyage. The insurers guarantee the ability of the ship to perform the voyage, not that she shall perform it at all events. The loss of the voyage as to the cargo is not a loss of the voyage as to the ship. *Alexander v. Baltimore Ins. Co.*, 4 Cranch (U. S.), 370..

A general policy, insuring all persons interested, and containing no warranty of neutral property, covers belligerent as well as neutral property. *Hodgson v. Mar. Ins. Co.*, 5 Cranch (U. S.), 100. Therefore a policy on a vessel which has obtained a registry, without complying with the acts of Congress, is not void. *Ocean Ins. Co. v. Polleys*, 13 Pet. (U. S.) 157. In *Kohne v. Ins. Co.*, 1 Wash. (U. S. C. C.) 93, where the agreement of insurance was made while both parties were ignorant of the loss, and the policy was completed and executed, although not delivered, it was held that the policy was valid and binding. So where parties to a contract of insurance, ignorant of the facts, make an agreement, by a memorandum on the policy which is intended as an indulgence to the assured, the mistake will not prejudice either of them. *Scriba v. Ins. Co. of N. America*, 2 Wash. (U. S.) 107.

If the trade in which a vessel is to be engaged during the voyage is contrary to the laws of the country, or the laws of nations, a policy upon the ship, equally with one on the cargo, the peculiar subject of interdiction, is void. *Gray v. Sims*, 8 Wash. (U. S.) 276; *Craig v. Ins. Co.*, Pet. (U. S. C. C.) 410; *Benton v. Hope*, 19 La. An. 463; *Breed v.*

Eaton, 10 Mass. 21; Richardson v. Maine Ins. Co., 6 Mass. 102. So if a contract of insurance is legal when it is made, and the performance of it is rendered illegal by a subsequent law, both parties are discharged from its obligations. In such case, the insured loses his indemnity, and the insurer his premium. Gray v. Sims, 3 Wash. (U. S.) 276.

A policy is not divisible so as to be good in part and bad in part. If at its inception it is founded in any illegality in which one only of the owners participated, it is utterly void as to all. Clark v. Protection Ins. Co., 1 Story (U. S.), 109. A policy insuring against foreign trade-laws may be valid; but such a risk must be expressly assumed in the policy: Parker v. Jones, 13 Mass. 173; unless none but a contraband trade can be carried on with the country for which the vessel is destined. Gardner v. Smith, 1 Johns. Cas. (N. Y.) 141; Richardson v. Maine Ins. Co., 6 Mass. 102.

A policy on a vessel "at and from" a certain island, protects her while sailing from port to port of the island to take in a cargo. Gracie v. Ins. Co., 8 Cranch (U. S.), 75.

Policies are not only construed liberally, but also in accordance with the known course of trade. Thus, in *Columbian Ins. Co. v. Cattell*, 12 Wheat. (U. S.) 383, a policy "at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States upon all lawful goods," was held, in accordance with the known course of trade, to cover the return cargo. Such an insurance covers the cargo during the whole voyage, out and home, so long as the assured has the specific amount of property on board, without any reference to the fact that a portion of the specific cargo has been landed at an intermediate port. See, for rules of construction applied to policies of marine insurance, *Orient, &c. Ins. Co. v. Wright*, 23 How. (U. S.) 401; *Sun, &c. Ins. Co. v. Wright*, id. 412; *Ins. Co. v. Wright*, 1 Wall. (U. S.) 456; *Hurlburt v. Ins. Co.*, 2 Sumn. (U. S.) 471; *Andrews v. Essex, &c. Ins. Co.*, 3 Mas. (U. S.) 6; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Douville v. Sun Mut. Ins. Co.*, 12 La. An. 259; *Libby v. Gage*, 14 Allen (Mass.), 261; *Roe v. Columbus Ins. Co.*, 17 Miss. 301; *McAllister v. Tennessee, &c. Ins. Co.*, 17 Mo. 306; *Mercantile Ins. Co. v. State Ins. Co.*, 25 Barb. (N. Y.) 319; *Savage v. Corn Exchange, &c. Ins. Co.*, 4 Bosw. (N. Y.) 1; *Hartshorne v. Union, &c. Ins. Co.*, 5 id. 538; *Rolker v. Western Ins. Co.*, 8 id. 222; *Ogden v. New York, &c. Ins. Co.*, id. 248; *Mallory v. Commercial Ins. Co.*, 9 id. 101; *Swinerton v. Columbian Ins. Co.*, id. 361; *Hood v. Manhattan Ins. Co.*, 2 Duer (N. Y.), 191; *Ogden v. General Mut. Ins. Co.*, id. 204.

A policy "at and from a port," if the vessel is in a foreign port in the course of a voyage, attaches from the time of her first arrival there; but if in a domestic port, it attaches from the date of the policy; and if the vessel has been lying in port without reference to any particular

voyage, then it attaches from the time preparations are begun to be made for the voyage insured. If the assured became owner while the vessel is lying in port, it does not attach until after his ownership began. A policy for A. B., or whom it may concern, made by an agent without warranty or representation of national character, will cover the interest of any person, whether an American or foreigner, who has authorized it. *The Sydney*, 27 Fed. Rep. 119. If on a policy "at and from," the assured unreasonably delays the commencement of the risk or the voyage, the underwriter is discharged. *Seamans v. Loring*, 1 Mas. (U. S.) 127. A mistake in the marks of the goods will not prevent the policy from attaching, if they were actually on board. *Ruan v. Gardner*, 1 Wash. (U. S. C. C.) 145.

An open policy, stipulating for an additional premium on goods shipped by certain vessels, with a clause requiring the premium or risks to be fixed at the time of endorsement, does not attach to such excepted vessels, at the time when reported, but the assured must first pay or secure the additional premium fixed by the underwriters in respect to the particular shipment. *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401; *Sun Mut. Ins. Co. v. Wright*, id. 412.

A policy upon outfits, and upon catchings substituted for the outfits, in a whaling voyage, protects the blubber. *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.), 603. The "rating" of a vessel, as the term is used in a policy, means her relative state in reference to insurable qualities. *Orient Mut. Ins. Co. v. Wright*, 1 Wall. (U. S.) 456.

A stipulation that the insurers shall not be liable "for any partial loss on the goods or on the vessel and freight, unless it amount to five per cent, exclusive in each case of all charges and expenses," &c., does not exonerate the underwriters from liability for successive losses on the cargo, each less than five per cent, but amounting to more in the aggregate. The clause has reference to the three several subjects insured, — goods, freight, and vessel, and requires a damage of five per cent to justify a claim in each case. *Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 367.

If a policy insures against "unlawful arrests, restraints, and detentions," a restraint by a blockading force is not a peril insured against, because not unlawful. *McCall v. Marine Ins. Co.*, 8 Cranch (U. S.), 59. The term "war risk" in a policy, wherein the government is the insurer, cannot be extended beyond the acts of the public enemy or the casualties of war; the government does not insure against its own acts. *Bogert v. United States*, 2 N. & H. (U. S.) 159.

Under a clause "that if the vessel after a regular survey should be condemned as unsound or rotten, the underwriters should not be bound to pay," a report of surveyors that she was unsound, but not referring to the commencement of the voyage, does not discharge the insurers. *Marine Ins. Co. of Alexandria v. Wilson*, 3 Cranch (U. S.), 187. Under

a warranty "by the assured, free from average, unless general," the underwriters are not liable for partial losses of every kind which do not arise from a contribution towards a general average. The clause authorizing the assured, in case of any loss or damage, to labor and travel for the preservation of the cargo, applies only to losses within the policy. *Biays v. Chesapeake Ins. Co.*, 7 Cranch (U. S.), 415. In *Strong v. Sun Ins. Co.*, 31 N. Y. 103, it was held that where by the terms of the contract of insurance upon the body, tackle, apparel, &c., of a propeller, the insurers are "not to be liable for the bursting of the boilers," the language is to be understood that they are not to be liable for damage resulting to the vessel or otherwise "on account of" the bursting of the boilers. By a policy upon a new ship still upon the ways, describing a period of risk "while being safely launched," and "until moored twenty-four hours in safety," the vessel is protected from the moment the launching commences against accidents in the progress of that work not arising from negligence, fraud, ignorance, or misconduct of those in the charge of the vessel. Accordingly, when a vessel so insured in the process of launching stopped on the ways, in a situation in which she was in a most critical and dangerous position, her stern floated, and she strained, and she was in imminent danger of becoming hogged, and after sixteen days by great exertions she was preserved and floated in safety, the insured was *held* entitled to recover the actual expenses necessarily incurred in the preservation of the vessel, and in her deliverance from danger of injury. *Frichette v. State, &c. Ins. Co.*, 3 Bosw. (N. Y.) 190. In *Howe v. Mercantile Ins. Co.*, 17 How. Pr. (N. Y.) 188, the insurers assumed the risks of "pirates, rovers, assaulting thieves, jettisons, barratry of the master and mariners, unless the assured be owner or part owner of the vessel," and it was held that the latter clauses qualified only the words "barratry of the master and mariners." In *Western Ins. Co. v. Cropper*, 32 Penn. St. 351, a policy of insurance for \$3,500 on the hull, tackle, machinery, and apparel of a propeller, contained the following clause: "It is understood that this company is not liable for any breakage or derangement of the engine, or bursting of the boiler or any of the parts thereof." It was held that this clause must be construed as extending only to immediate damage to machinery.

NOTE 25. **What the Policy covers.**—Where a policy covers "property on board" it embraces whatever the assured has a *bona fide* equitable interest in, whether he has the legal title or not: *Tyler v. Ætna Ins. Co.*, 12 Wend. (N. Y.) 507; *Locke v. N. American Ins. Co.*, 13 Mass. 61; and if insured by the master, covers his interests in commissions. *Holbrook v. Brown*, 2 Mass. 280. If a policy is issued "on cargo or freight" of a ship, "either or both to the amount insured," it is an insurance of freight or cargo, if in the event the insured has only one of these descriptions of property at risk in the voyage insured; and if he should have both at

risk, then it is an insurance of both proportionally to the interest of the insured in the subjects respectively. *Faris v. Newburyport Ins. Co.*, 3 Mass. 476. The written words in a policy overcome the force of the printed; thus, where in the ordinary printed form of a cargo policy a clause was written by which the insurance was declared to be "on freight earned or not earned, policy to be proof of interest," it was held that the policy covered freight, and not cargo. *Huth v. New York, &c. Ins. Co.*, 8 Bosw. (N. Y.) 538.

The word "cargo" does not ordinarily cover live stock; but if live stock constitutes the only or the principal article of exportation from the port from which the vessel is to sail, to the port to which she is destined; or if according to the mercantile usage of the place of effecting the insurance, the word is understood to cover live stock, then an insurance under that general name will cover it. *Allyne v. Ins. Co.*, 2 G. & J. (Md.) 136; *Walcott v. Eagle Ins. Co.*, 7 Pick. (Mass.) 271. "Cargo" covers oil and other products of a whaling voyage. *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227. Goods on deck are not included under the head of "goods and cargo." *Lenox v. U. S. Ins. Co.*, 3 Johns. Cas. (N. Y.) 178.

A policy on goods "out" and the proceeds thereof home, does not cover the identical goods composing the outward cargo brought home on the return trip, as the goods themselves cannot by any rules of construction be regarded as the "proceeds" of the goods. *Dow v. Whitton*, 8 Wend. (N. Y.) 166. But a policy on the "proceeds" of the outward cargo "out and home" covers the value of that cargo in the return cargo, *if the return cargo was procured on the credit of the outward.* *Haven v. Gray*, 12 Mass. 71.

A policy issued on cattle carried between decks, against loss "caused directly by a sea, stranding, sinking, burning, or collision," was held to cover a loss which resulted from a severe storm, which caused the vessel to roll so that the cattle were thrown down violently and killed. *Snowdon v. Guion*, 101 N. Y. 458.

A policy covering "property on board" covers bank bills on board for the uses of the vessel. *Whitton v. Old Colony Ins. Co.*, 2 Met. (Mass.) 1. And it seems that under the general term "cargo" coin to be invested by the master is covered. *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429. Pickled fish are held not to come under the head of "perishable goods." *Baker v. Ludlow*, 2 Johns. Cas. (N. Y.) 269.

It is the proximate, not the remote, cause of loss which determines the liability of the insurer; therefore, where the defendants during the war of the rebellion insured, in the charter party of a vessel, against the "war risk," and she was driven by a gale within range of the enemy's batteries, where she was safely anchored from the perils of the sea, but the batteries opened upon her and destroyed her ground tackle, so that she went on shore and was captured, the acts of the enemy were held to constitute the proximate cause of the loss, so as to render the defendants liable.

Baker v. United States, 3 N. & H. (U. S.) 76. Where two causes concur in the production of loss, one at the risk of the assured and the other insured against, if the damage by the perils respectively can be discriminated, each party must bear his proportion. **Norwich, &c. Co. v. Western Mass. Ins. Co.**, 12 Wall. (U. S.) 201; **Howard F. Ins. Co. v. Norwich, &c. Co.**, 12 id. 194. And in such a case the loss must be attributed to the efficient predominating peril, whether that peril was or not in activity at the final consummation of the disaster. **Dale v. N. E. Mut. Marine Ins. Co.**, 2 Cliff. (U. S. C. C.) 394.

In **Anthony v. Ætna Ins. Co.**, 1 Abb. (U. S. C. C.) 343, the plaintiff shipped cattle, under a policy providing that the adventure should commence from the loading, and continue until the property was safely landed, with the usual clause of insurance against perils of the lakes, &c., and all other perils and misfortunes, &c., and the usual risk of lighterage; the vessel was prevented from landing by a bar, and the cattle, being transferred to a lighter, broke loose and many of them were drowned, — *held*, that the loss was within the policy and the insurers were liable. Where the insured has recovered a part of his actual loss from a wrongdoer in a case of collision, the sum recovered is to be deducted from the gross amount of the damage, and not from the loss adjusted as a partial loss with a deduction of one-third new for old. **Dunham v. N. E. Mut. Ins. Co.**, 1 Low. Dec. (U. S.) 253. But an insurance company is liable for the full amount of their policy on a final total loss, notwithstanding the payment of prior general average losses. **Christie v. Buckeye Ins. Co.**, 5 Am. L. T. (U. S.) 42.

The charterer of a vessel has no insurable interest in the freight: **Mellen v. National Ins. Co.**, 1 Hall (N. Y.), 452; **Robbins v. N. Y. Ins. Co.**, 1 Hall (N. Y.), 325; **Cheriat v. Barker**, 2 Johns. (N. Y.) 346; and can only insure by specially declaring the nature of his interest. **Riley v. Delafield**, 7 Johns. (N. Y.) 522. Where there is an insurance upon freight, with a provision that the insurers shall not be liable for any partial loss, the risk is upon the whole freight as an integral subject, and not upon the separate items of freight in the goods of different shippers; and therefore, if any freight has been earned, or could have been earned, upon any part of the cargo, the underwriters are not liable on the policy. **Ogden v. General Mut. Ins. Co.**, 2 Duer (N. Y.), 204.

A policy on freight, at and from a foreign port, attaches on the commencement of lading the goods on board. **Smith v. Steinbach**, 2 Caines Cas. (N. Y.) 158. Under a policy on freight which provided that the risk should commence "upon the said freight from and immediately following the loading thereof on board the said vessel," and the vessel was lost in port before the cargo was laden on board; it was held, that the risk had not commenced, and that the underwriters were not liable. **Gordon v. American Ins. Co.**, 4 Den. (N. Y.) 360. As a rule, where the ship is lost, the insurer on freight is not liable if the master neglects,

having it in his power, to forward the goods by another vessel. *Bradhurst v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 17; *Schieffelin v. New York Ins. Co.*, id. 21; *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564. So where there is a policy on freight, and the vessel immediately after sailing is damaged in a gale of wind, and returns to port, and the cargo is delivered to the different shippers, the assured cannot recover for a loss on freight, unless he insists on carrying the goods, so as to entitle himself to it, and if the ship is injured by the perils of the sea, but capable of being repaired in a reasonable time, the owner ought to repair her and continue the voyage, so as to claim his freight. *Herbert v. Hallett*, 3 Johns. Cas. (N. Y.) 93. So where a vessel after proceeding on her voyage is driven back to the port of departure, and there abandoned as for a total loss, and the shippers receive their goods, there is total loss of freight for which the assured may recover, and if the expense of sending on the goods by another vessel will exceed half the freight agreed upon by the charter party, there is a technical total loss of freight, which will justify an abandonment. *Center v. American Ins. Co.*, 7 Cow. (N. Y.) 564. If the assured is master and consignee and joint owner of the cargo, his selling at a port of necessity where the voyage was broken up, will be treated as a reception of the goods there by him as owner, and a *pro rata* freight earned; and the insurer is only liable for the balance. *Williams v. Smith*, 2 Caines (N. Y.), 13.

Where a vessel is totally lost before arriving at her port of destination, and the master drowned, and the consignee after communicating with the underwriters abandons the wreck to a person designated by them, the insurers are liable for a total loss of freight, though a part of the cargo is saved. *Robertson v. Atlantic Mut. Ins. Co.*, 5 J. & Sp. (N. Y.) 442. For instances in which no recovery can be had on a policy for loss of freight, see *Allen v. Mercantile, &c. Ins. Co.*, 44 N. Y. 437; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Fielder v. N. Y. Ins. Co.*, 6 Duer (N. Y.), 282; *Marine Ins. Co. v. United Ins. Co.*, 9 Johns. (N. Y.) 186.

Insurance on passage-money is governed by the same general rules as insurance on freight. *Ogden v. N. Y. Mut. Ins. Co.*, 35 N. Y. 418.

Where the terms of a policy are clear, certain, and unambiguous as to the voyage insured, they cannot be varied by propositions asking the rate for another voyage. *Vandervoort v. Smith*, 2 Caines (N. Y.), 155. The policy is to be construed with reference to the topography of the country to which the ship is bound; by a port on the coast of Yucatan is understood an open road or anchorage, such places being there called ports. *De Longuemere v. New York F. Ins. Co.*, 10 Johns. (N. Y.) 120; *De Longuemere v. Fireman's Ins. Co.*, id. 126.

In the clause providing that "the assurers take no risk in port but sea-risk," the word "port" is used in contradistinction to high seas. *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9. A policy upon goods laden or to be laden on board a ship, for and during six calendar months, with-

out reference to any particular voyage, the risk to commence at the loading of the goods on board the vessel, contemplates a trading voyage; and however often the goods may be changed, the policy attaches. *Coggeshall v. Am. Ins. Co.*, 3 Wend. (N. Y.) 283.

Where a time policy provided that if the vessel should be *at sea* at the expiration of the term the risk should continue at the same rate, until her arrival at the port of destination; and the term expired whilst she was making repairs in a port to which she had proceeded for the purpose of taking in cargo, it was held, that the insurers were not liable for a subsequent loss. *Am. Ins. Co. v. Hutton*, 24 Wend. (N. Y.) 330. But the policy attaches for the renewed term, if she has made the least locomotion, with a regular clearance; she is deemed at sea, though afterwards detained or driven back. *Union Ins. Co. v. Tyson*, 3 Hill (N. Y.), 118. A policy on account of whom it may concern ordinarily inures to the benefit of all the owners, and an action may be maintained thereon for their benefit: *Walsh v. Washington M. Ins. Co.*, 32 N. Y. 427; and covers the interest of those whom it was *intended* to protect. And therefore, if an agent, separately instructed by the owners of different shares in a vessel to insure their interests, effects several policies in his own name "on account of whom it may concern," such policies will be deemed to cover the separate interests of the several owners, as manifested by the agent's acts and declarations at and about the time of effecting the several policies: *Fogay v. Atlantic Mut. Ins. Co.*, 2 Robt. (N. Y.) 79; and will inure to the benefit of a mortgagee of the vessel. *Rogers v. Trader's Ins. Co.*, 6 Paige (N. Y.), 583. A policy generally "on account of the owners" inures only for the benefit of those intended to be insured; which may be shown by extrinsic evidence. *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561. A policy insuring the plaintiffs "on account of whom it may concern, for outward shipments and homewards, to be for account of themselves, and to be consigned to them by invoice and bill of lading," covers a homeward cargo consigned to them for sale, under invoice and bill of lading from a port named in the policy. *Rölker v. Great Western Ins. Co.*, 3 Keyes (N. Y.), 17.

If a policy is effected by one of two joint owners, on his account "and whomsoever else it may concern," it will be deemed an insurance on joint account; and if the policy is for half the cargo, and on capture half is condemned and half acquitted, the assured can recover only a moiety of the sum insured. *Lawrence v. Sebor*, 2 Caines (N. Y.), 203. If a part owner insures generally, the policy only covers his interest, and does not inure to the benefit of another part owner; but the rule is otherwise if the policy is "for account of whom it may concern:" *Turner v. Burrows*, 5 Wend. (N. Y.) 541; and a policy on account of —, is one for whom it may concern. *Burrows v. Turner*, 24 Wend. (N. Y.) 276. Notwithstanding a provision that any change of interest, in whole or in part, shall avoid the policy, a sale of the vessel and the execution of a mortgage for

part of the purchase-money, accompanied by a power of attorney, placing her under the entire control of the mortgagees, does not discharge the underwriters. *Fernandez v. Great Western Ins. Co.*; 3 Robt. (N. Y.) 457. If the policy provides that the risk is against a total loss only, it means an actual, not a technical total loss. *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 319. The usual terms of a printed policy are controlled by a clause on the margin. *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Woodruff v. Ins. Co.*, 2 Hilt. (N. Y. C. P.) 112; *Dows v. Howard Ins. Co.*, 5 Robt. (N. Y.) 473.

A marine policy does not insure against any perils other than those enumerated, and such as are necessarily or usually consequential thereon. *Dows v. Howard Ins. Co.*, 5 Robt. (N. Y.) 473. If another vessel than that sought to be insured is named in the policy, the risk never attaches; unless, in point of fact, both parties had in view the same vessel, and intended to insure the particular vessel lost. *Hughes v. Mercantile Mut. Ins. Co.*, 55 N. Y. 265. The date of a policy is not conclusive evidence of the time of its actual subscription. *Earl v. Shaw*, 1 Johns. Cas. (N. Y.) 313. And where a policy is antedated the underwriters assume a retrospective risk for an intermediate loss. *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Pr. (N. Y.) 351. A policy on "all kinds of lawful goods" embraces articles contraband of war. *Seton v. Low*, 1 Johns. Cas. (N. Y.) 1; *Skidmore v. Desdoity*, 2 id. 77; *Juhel v. Rhineland*, id. 120; *Howland v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 42. A policy "against all risks" protects the assured against every loss which may happen during the voyage, not arising from his own fraudulent acts. *Goix v. Knox*, 1 Johns. Cas. (N. Y.) 337. A policy on goods out and the proceeds thereof home, does not cover the identical goods comprising the outward cargo, if brought home on the return voyage. *Dow v. Whitten*, 8 Wend. (N. Y.) 160; *Dow v. Hope Ins. Co.*, 1 Hall (N. Y.), 166. A policy on merchandise will cover a currie. *Duplanty v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 157. In a policy on a voyage from one port to another, where the goods are to be landed, and thence reshipped to their ulterior destination, it is not necessary to mention such port of ulterior destination. *Steinbach v. Columbian Ins. Co.*, 2 Caines (N. Y.), 129. If the *termini* of the voyage insured is preserved, it is only a deviation to touch at an intermediate port; and the insurer is liable for a loss occurring before her arrival at the point of divergence. *Henshaw v. Marine Ins. Co.*, 2 Caines (N. Y.), 274. A policy on a voyage from New York to Barbadoes "and a market" gives the assured liberty to proceed *bona fide* from island to island in the West Indies until he has disposed of the whole of his cargo. *Maxwell v. Robinson*, 1 Johns. (N. Y.) 333. If the vessel sailed on the voyage insured, the policy is not avoided by her taking a clearance for another port, in order to avoid detention by cruisers. *Talcot v. Marine Ins. Co.*, 2 Johns. (N. Y.) 130. Where a vessel and cargo were insured "at and from St. Bartholomew's to Havanna," it was

held that the policy covered the property insured until the ship had been moored twenty-four hours in safety, in the inner harbor of Havana. *Dickey v. United Ins. Co.*, 11 Johns. (N. Y.) 358. A policy upon a vessel at and from New Orleans, Campeachy, and Havanna, for the period of six calendar months from a certain day, is a policy on time, and does not limit the navigation to voyages between the places specified, provided she takes her departure from either of them. *Grousset v. Sea Ins. Co.*, 24 Wend. (N. Y.) 209.

A general policy without warranty covers war risks of all kinds and of all countries; the fact that the vessel had a false clearance is, in such case immaterial. *Barnewall v. Church*, 1 Caines (N. Y.), 217. And where a policy contains no warranty of neutrality, or of national character, the insurers take upon themselves all risks, belligerent as well as neutral. *Elting v. Scott*, 2 Johns. (N. Y.) 157. A policy on goods until twenty-four hours after they are landed continues until twenty-four hours after *all* the goods are landed. *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141. The words "at and from," in a policy on goods, mean from the time the goods are laden on board the vessel: *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10; and in a policy on a vessel in a distant port mean the day on which she is mentioned to be there. *Kemble v. Boune*, 1 Caines (N. Y.), 75. Goods laden on deck are not covered unless expressly mentioned. *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178. A policy on a vessel's return cargo will not attach on her outward cargo, though, in consequence of not being permitted to discharge it at her port of destination, she was compelled to transport it to another. *Graves v. Marine Ins. Co.*, 2 Caines (N. Y.), 339; *Richards v. Marine Ins. Co.*, 3 Johns. (N. Y.) 307. See *Vredenberg v. Gracie*, 4 id. 444, note. A policy on goods laden on board the vessel in a foreign port does not attach to the remains of the outward cargo, which is there hoisted out of the hold, and afterwards restowed. *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

NOTE 26. Time Policies. Implied Warranties. — In all time policies issued while a vessel is in a home port or in foreign, where full repairs may be made, there is an implied warranty of seaworthiness: *Hoxie v. Pacific Mut. Ins. Co.*, 7 Allen (Mass.), 211; *Dallam v. Ins. Co.*, 6 Phila. (Penn.) 15; and that she will be manned and navigated by a competent master and crew. *The Vincennes*, 21 L. Rep. (U. S.) 616; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Silva v. Law*, 1 Johns. Cas. (N. Y.) 184. And the species of seaworthiness implied applies to her condition for the voyage, and not for lying in port. She must, at the time when the voyage is commenced, have a hull which is capable of resisting the ordinary action of the wind and waves in the particular voyage insured, without damage. *Watson v. Ins. Co. of North America*, 2 Wash. (U. S. C. C.) 480; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148; *Dupont v.*

Vaner, 19 How. (U. S.) 162. But this rule does not apply to a time-policy on a vessel in a distant sea "lost or not lost." *Rouse v. Ins. Co.*, 3 Wall. Jr. (U. S. C. C.) 274; *Capen v. Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Jones v. Ins. Co.*, 2 Wall. Jr. (U. S. C. C.) 278. Seaworthiness is presumed; consequently, ordinarily the burden is upon the insurer to prove that the vessel was unseaworthy; in which case the policy never attached. *Van Wickle v. Mechanics', &c. Ins. Co.*, 97 N. Y. 350; *Am. Ins. Co. v. Ogden*, 15 Wend. (N. Y.) 532; *Field v. Ins. Co. of North America*, 3 Md. 244; *Hudson v. Williamson*, 3 Brev. (S. C.) 342; *Taylor v. Lowell*, 3 Mass. 56; *Warren v. U. S. Ins. Co.*, 2 Johns. Cas. (N. Y.) 231; *Talcott v. Marine Ins. Co.*, 2 Johns. (N. Y.) 130; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56; *Starbuck v. N. E. Ins. Co.*, 19 id. 198; *Paddock v. Franklin Ins. Co.*, 11 id. 227; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389; *Adderley v. American Mut. Ins. Co.*, Tan. Dec. (U. S.) 126. But if the vessel springs a leak soon after the risk attaches, or she starts on a voyage without any apparent cause, a presumption (which may be rebutted) arises that she was unseaworthy. *Walsh v. Washington Ins. Co.*, 32 N. Y. 427; *Rugley v. Sun Ins. Co.*, 7 La. An. 279; *Parker v. U. S. Ins. Co.*, 15 id. 688; *Miller v. S. C. Ins. Co.*, 2 McCord (S. C.), 336; *Patrick v. Hallett*, 3 Johns. Cas. (N. Y.) 76. If the vessel is seaworthy at the time of sailing, the warranty is met, even though she was not in that condition at the inception of the risk. *Taylor v. Lowell*, *ante*; *McLanahan v. Universal Ins. Co.*, *ante*. So, if she is seaworthy before the loss, the insurer is liable, although she was not so at the time the voyage began. *Lapine v. Sun Ins. Co.*, 8 La. An. 1. Inadequacy of crew to man and sail the vessel at the time she leaves her port of lading constitutes a breach of warranty as to seaworthiness. *The Gentleman, Olc. Adm.* (U. S.) 110. And according to the case last cited, the breach exists although it was impossible to procure competent hands to man her. The warranty is absolute, and continues throughout the voyage. In a Massachusetts case, at the inception of the risk, under a policy on cargo from the date of the policy to the end of the voyage, the ship was at sea in a very leaky condition, but carried her cargo to an intermediate port, was there condemned as unseaworthy from no subsequent peril, sold, and the cargo transshipped to another vessel. It was held that there was no implied warranty of seaworthiness at the inception of the risk, and that the underwriters were liable for a subsequent loss of the cargo before arrival at the port of destination. *Macy v. Mutual, &c. Ins. Co.*, 12 Gray (Mass.), 497. It is for the jury to determine whether a ship is so much out of trim as to be unseaworthy, and even though she is out of trim, but before loss happens is put in proper trim, the insurer will be held. *Chase v. Eagle Ins. Co.*, 5 Pick. Mass. 51. In a New York case a cargo was insured at and from North Carolina to New York, and it was held that if the vessel was seaworthy when she passed the boundary line of North Carolina, it was sufficient, and the underwriters could not give evidence

that she was unseaworthy previous to that time. *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270.

On a policy "at and from," the warranty of seaworthiness attaches from the commencement of the risk. If between that time and the sailing of the vessel she becomes unseaworthy, the insurer is liable. A leak occasioned by rats is within the policy. *Garrigues v. Coxe*, 1 Binn. (Penn.) 592. But if a vessel is unseaworthy when she starts on her voyage, it is a sufficient defence to the insurers, though she arrives in safety at the end of her voyage. *Prescott v. Union Ins. Co.*, 1 Whart. (Penn.) 399. The implied warranty of seaworthiness extends to the machinery of a steamer. *Myers v. Girard Ins. Co.*, 26 Penn. St. 192. The insured is bound to put a vessel insured in good condition and make her seaworthy, and the insurer is bound to keep her so. *Miller v. Russell*, 1 Bay (S. C.), 309. But where a policy provides that the vessels used by the insured *shall be approved by the insurance company*, the ordinary warranty of seaworthiness is superseded, and the certificate of the company's inspector is sufficient to enable the insured to sue upon the policy. And where the inspection is made only in the port of departure, there is no obligation upon the insured that the vessel shall be put in as good a condition in intermediate ports as when inspected. *Marine, &c. Ins. Co. v. Burnett*, 29 Tex. 433. Where a new and safe mode of repairing ships has come into use since the ship was insured, the insured may avail himself of it without prejudice to the policy. *Ellery v. New England Ins. Co.*, 8 Pick. (Mass.) 14.

If a vessel in the course of her voyage puts into a port where repairs can be made, and afterwards sails therefrom with a defect in her bottom produced during the voyage by the perils of the seas, and which causes her to founder, the insurers are liable for the loss, unless the captain had reasonable cause to suspect the existence of the defect when the vessel was in such port, or had reasonable cause to believe that she could not proceed safely home, without having the same repaired. *Starbuck v. N. E. Mut. Ins. Co.*, 19 Pick. (Mass.) 198. In *Wallenstein v. Columbian Ins. Co.*, 3 Robt. (N. Y.) 528, an application by the plaintiffs for insurance upon their steamer stated that the vessel was "in perfect order," and "warranted to sail in a few days," and a policy was issued thereupon. The vessel was detained forty-five days after the date of the policy in making necessary repairs and testing the machinery, &c., and it was held that the policy was not thereby avoided. After a boat has been injured by one of the perils insured against, and partially repaired so as merely to enable her to run, the running her in this unseaworthy state in good faith until she is finally repaired does not avoid the policy. *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio, 71.

The law implies seaworthiness only at the commencement of the voyage; and if repaired afterwards in the course of the voyage, only due diligence is necessary to render her seaworthy: *Peters v. Phoenix Ins.*

Co., 3 S. & R. (Penn.) 25; and her seaworthiness at the commencement of a voyage constitutes no *prima facie* evidence that a subsequent necessity for repairs arose from some extraordinary peril. Nor does the necessity of repairs in the course of the voyage, on account of mere wear and tear, impair the original warranty of seaworthiness. *Donnell v. Ins. Co.*, 2 Sumn. (U. S.) 366. Where the captain is the owner of a vessel insured, and the vessel becomes unseaworthy during the voyage, and he neglects on reaching a port to have proper repairs made, and by reason of such neglect the vessel is afterwards lost on the voyage, the insurers are not responsible. *Cudworth v. S. C. Ins. Co.*, 4 Rich. (S. C.) 416; *Merchants, &c. Ins. Co. v. Sweet*, 6 Wis. 670.

Sailing without a ship carpenter is not sufficient to establish unseaworthiness: *Walsh v. Washington Ins. Co.*, 3 Robt. (N. Y.) 202; but the employment of a pilot is a question of seaworthiness: *Lapine v. Sun Ins. Co.*, 8 La. An. 1. But if the vessel is navigated by a skilful officer, the absence of a pilot may not operate as a breach of the implied warranty as to seaworthiness. *Keeler v. Fireman's Ins. Co.*, 3 Hill (N. Y.), 250. Overloading is not a breach of the implied warranty of seaworthiness, which avoids a policy, where the unseaworthiness supervened during the progress of the voyage, and after the policy has already attached. *Merchants', &c. Ins. Co. v. Butler*, 20 Md. 41. But, generally, if a vessel is overloaded or unduly laden, she is unseaworthy. But whether or not she is unduly laden depends upon the capacity of the boat or vessel, not upon the depth of water upon the shoals and bars in the river in which she is navigated; reference is to be had to the capacity of the craft, and not to the capacity of the river, in deciding that question. *Cincinnati, &c. Ins. Co. v. May*, 20 Ohio, 211.

A non-compliance with the statutes of the United States requiring that every vessel bound on a voyage across the Atlantic shall have on board a certain quantity of water, well secured under deck, under a penalty, does not *ipso facto* render the vessel unseaworthy or the voyage illegal, so as to avoid a policy. *Warren v. Manufacturers' Ins. Co.*, 13 Pick. (Mass.) 518. The mere fact that a vessel becomes unseaworthy during her voyage is not a breach of the implied warranty; and of a neglect to keep her seaworthy, the insurer can take advantage only when a loss occurs therefrom. *Starbuck v. N. E. Ins. Co.*, 19 Pick. (Mass.) 198. Compare *Am. Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287. Where a vessel, insured from New York to Bordeaux, after being out about thirty days, was without firewood, oil, or candles, so that for want of necessary light she was obliged to slacken sail at night, and was retarded in her voyage, it was held that she was not seaworthy. *Fontaine v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 58. But it is not a breach of the warranty of seaworthiness that the person named in the registry and shipping articles as master of the ship is an incompetent person, provided the vessel be actually under the direction of a competent navigator, appointed to take charge of

her by the owner. *Draper v. Commercial Ins. Co.*, 21 N. Y. 378. Where a vessel was shown to have been in good condition, seaworthy, and well officered and provisioned at the date of a policy of insurance covering the vessel, in March, 1865, and on the 3d day of July, while on its voyage, a fire was discovered in a room on the main deck, and was extinguished in the course of an hour by great exertions, and about an hour or an hour and a half afterwards the boat suddenly sank, — it was held that it sufficiently appeared that the loss was the direct consequence of the fire, and that no presumption could arise that at the time of the loss the vessel was unseaworthy. *Pointer v. Merchants', &c. Ins. Co.*, 20 La. An. 100. Nor if a vessel, soon after sailing, suddenly spring a leak and founder, without stress of weather or any apparent cause, this does not raise the presumption of unseaworthiness at the time of sailing. *Patrick v. Hallett*, 1 Johns. (N. Y.) 241. A policy upon a vessel contained a clause "that if the vessel, after a regular survey, should be condemned as unsound or rotten, the underwriters should not be bound to pay." Afterwards a report of surveyors found the vessel to be unsound and rotten, but did not refer to the commencement of the voyage. It was held that the report was not sufficient to discharge the underwriters. *Marine Ins. Co. v. Wilson*, 3 Cranch (U. S.), 188. But see *Jenney v. Columbian Ins. Co.*, 10 Wheat. (U. S.) 411; *Watson v. Ins. Co. of North America*, 2 Wash. (U. S.) 152; *Haff v. Marine Ins. Co.*, 8 Johns. (N. Y.) 163; *Innes v. Alliance, &c. Ins. Co.*, 1 Sandf. (N. Y.) 310; *Armroyd v. Union Ins. Co.*, 2 Binn. (Penn.) 394; *Steinmetz v. United States Ins. Co.*, 2 S. & R. (Penn.) 293; *Saltus v. Commercial Ins. Co.*, 10 Johns. (N. Y.) 487. If the assured lay a rational ground for the disability of the vessel by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burden of the proof of want of seaworthiness lies on the insurer. Otherwise when a disability happens from stress of weather without any sufficient cause. *Watson v. Ins. Co. of North America*, 2 Wash. (U. S.) 480. The condition of a vessel falling within the warranty of seaworthiness need not be represented to an underwriter at the time of obtaining insurance thereon, except in answer to inquiries; and the burden of proving misrepresentation in answer to such inquiries is upon the underwriter. *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.), 73. Where there is no contradictory testimony as to the unseaworthiness of a vessel, the court may instruct the jury that if the facts stated in the protest are true, she is unseaworthy. *Prescott v. Union Ins. Co.*, 1 Whart. (Penn.) 399. In all matters of this kind it is for the jury to weigh all matters of evidence; and where there has been evidence on both sides, the court will not disturb the verdict, even if contrary to the weight of evidence, unless the preponderance is such as to induce the belief that the jury must have mistaken the evidence. *Fuller v. Alexander*, 1 Brev. (S. C.) 149; *McFee v. S. C. Ins. Co.*, 2 McCord (S. C.), 503; *Patrick v. Hallett*, 1 Johns. (N. Y.) 241; *Union Ins. Co. v. Caldwell, Dudley* (S. C.), 263.

The burden of proving unseaworthiness at the time of insurance is on the insurer; but where a vessel has been found to put back into port on account of a storm, and an insurance is then effected without notice of the fact to the insurer, the burden is shifted, and the assured must show that she was then seaworthy. But unless overcome by competent evidence, the report of the surveyors of a port that the vessel is seaworthy is sufficient to establish the fact. *Batchelder v. Ins. Co. of North America*, 30 Fed. Rep. 459.

The presumption is in favor of seaworthiness; and it need not be alleged in the complaint. *Guy v. Citizen Ins. Co.*, 30 Fed. Rep. 695; *Phenix Insurance Co. v. Moag*, 78 Ala. 284. In *Baker v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 916, PARDEE, J., said: "There are two questions of fact in this case upon which the parties differ: (1) Was the *Orient seaworthy* when she left the port of Liverpool on the voyage during which she was insured? (2) Was she *seaworthy* when she sailed from Ship Island on the voyage during which she was wrecked and lost? Seaworthy, in the sense used, means in such a condition of strength and soundness as to resist the ordinary action of the sea, wind, and waves during the contemplated voyage. A ship is seaworthy in this sense when her hull, tackle, apparel, and furniture are in such a condition of soundness and strength as to withstand the ordinary action of the sea and weather. It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to *ordinary* perils; the underwriters are bound as to the extraordinary perils. In considering the evidence of seaworthiness, when a rational ground is laid, as in this case, for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage; and more especially where, as in this case, the former condition of the vessel before the two preceding years is proved to be that of a sound and seaworthy vessel, the burden of proof is thrown upon the underwriters to prove satisfactorily to the jury that she was not seaworthy and sufficiently strong to perform the voyage. The question as to whether a vessel is seaworthy or not, is to be determined in view of the voyage upon which she is to enter. A vessel may be seaworthy for a short voyage or in certain waters, and not seaworthy for a long voyage or upon the open sea. Thus in *Gillespie v. British American F. & L. Assn.*, 7 Q. B. (Ont.) 108, it was held that, if a vessel insured between Toronto and Quebec were lost by stranding in the river St. Lawrence, the question for the jury would be, not was she well found and seaworthy for the navigation of the open lake Ontario, but was she so for the navigation of the river; and if, in the opinion of the jury, she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation an absolute cause of forfeiture, without reference to the particular navigation in which the loss should occur."

In *Coons v. Ætna Ins. Co.* 18 C. P. (Ont.) 305, in a policy on the plaintiff's vessel, insuring only against perils of the sea, one condition was that defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question, some fifteen minutes after she had left port, began to leak, and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by plaintiff to rebut the presumption which, it was contended, therefore arose that the loss was not occasioned by perils of the sea. It was held that the plaintiff was bound to have given this evidence, and that the absence of it disentitled him to recover. The court granted a new trial, though of opinion that the defendants were entitled to a nonsuit, suggesting whether, if evidence were given of defendants' knowledge of the age, build, and material of which the vessel was built at the time of the insurance, it might not be held to modify the condition as to seaworthiness so as to make it subordinate to the particular vessel being insured.

In the same case, on a new trial reported in the 19 C. P. (Ont.) 235, one H. was called by plaintiff, who proved that he, as defendant's agent, accepted the risk on the vessel in question; that he had seen but not examined her, but judged her wholly from the registry, and insured her as B 1; that a B 1 vessel would be insured as readily as an A 1, the charge on freight being the same, and the seaworthiness would be expected to be the same, though the A 1 would not be so likely to go to pieces. It was held that these facts did not bring the case within the principle laid down in *Burgess v. Wickham*, 3 B. & S. 669, and *Clapham v. Langton*, 34 L. J. Q. B. 46; and therefore it was held that the new evidence did not alter the position of the parties, and that a nonsuit was properly directed.

In *Myles v. Montreal Ins. Co.*, 20 C. P. (Ont.) 283, in a marine policy issued by the defendants to the plaintiff, among other excepted perils or losses were those arising from rottenness, inherent defects, and other unseaworthiness. At the trial it appeared from the plaintiff's own evidence that the vessel in question, after sailing all day on a summer sea with a light breeze, in the evening suddenly came up into the wind, or broached to, refused to answer helm, and at once began settling down, when the crew abandoned her, and after they had rowed about thirty-five yards she sank. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to show that she was old and rotten in parts; that she in fact leaked before starting across the lake, in the canal and at the port of lading; and that men would not go in her without being paid extra wages, and the plaintiff himself stated that she was old, and he had given instructions not to canal her by night or leave port in a gale. The diver who examined her also found one stave wholly out and another

partially so. The whole case having been left to the jury on this evidence, it was held on appeal that the plaintiff should have been nonsuited.

But in *Dawson v. Home Ins. Co.*, 21 C. P. (Ont.) 20, in an action on a marine policy insuring plaintiff against perils of the lakes, loss arising from unseaworthiness excepted, where the evidence showed that the vessel was in excellent condition and seaworthy when she left port, and apparently up to the time of loss; that a squall struck her, and more than three hours after it was found that she was leaking much, in consequence of which she filled and went down, there being no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against the plaintiff, the only remarkable circumstance being that in the protest made by the master and mate there was no mention of the squall, nor was any cause assigned for the leak or consequent loss, it was held that the judge was right in submitting the case to the jury, and that the evidence fully warranted the finding for the plaintiff. In all cases where the inability of a ship to perform her voyage becomes evident soon after leaving port, and she founders without stress of weather, or other adequate cause of injury, the law raises the presumption of unseaworthiness; but it is otherwise where seaworthiness is affirmatively established, and it is shown that she encountered marine perils such as might disable a staunch vessel. *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427. Thus where a vessel on the next day after sailing suddenly sprung a leak, and was lost without any stress of weather or other visible cause to which the leak could be ascribed, it was held that the loss was to be imputed to some latent or inherent defect in the vessel, which rendered her unseaworthy, and for which the underwriters were not liable. *Patrick v. Hallett*, 3 Johns. Cas. (N. Y.) 76; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124. But in *Patrick v. Hallett*, 1 id. 241, on a demurrer to evidence, by which it was found that the vessel was *seaworthy* at the time of sailing, the court arrived at an opposite conclusion; and in *Sherwood v. Ruggles*, 2 Sand. (N. Y.) 55, it was held to be a question for the jury. Where a ship, soon after sailing on her voyage becomes so leaky or disabled as to be incapable of prosecuting the voyage, and such disability cannot be ascribed to any violent storm or extraordinary peril of the sea, *the fair and natural presumption is, that it arose from causes existing at the time she sailed, and she was then unseaworthy*; and a verdict in favor of the assured, under such circumstances, will be set aside as contrary to evidence. *Wright v. Orient Mut. Ins. Co.*, 6 Bos. (N. Y.) 269; *Sturm v. Great Western Ins. Co.*, 40 How. Pr. (N. Y.) 423. Where goods were insured "from New York by steamer or steamers to Chagres, at and from thence by the usual conveyances across the Isthmus to Panama, and at and from thence by steamer or steamers, to San Francisco," and were damaged by being placed on board of leaky boats on the Chagres River, the underwriters were held not liable. *Van Valkenburgh v. Astor Mut. Ins. Co.*, 1 Bosw. (N. Y.) 61. Under a clause which exoner-

ates the insurers "if the vessel upon a regular survey should be declared unseaworthy by reason of her being unsound and rotten," a regular survey finding unsoundness without more is conclusive upon the parties. *Brandegge v. National Ins. Co.*, 20 Johns. (N. Y.) 328; *Griswold v. National Ins. Co.*, 3 Cow. (N. Y.) 96; *Rogers v. Niagara Ins. Co.*, 2 Hall (N. Y.), 86. An insurer is exonerated from liability, where the vessel leaves an intermediate port in an unseaworthy condition; or where such condition is owing to the culpable negligence of the master; or where the property is damaged by reason of some particular defect which rendered the vessel unseaworthy, or by some means to which such defect directly contributed. *Howard v. Orient Ins. Co.*, 2 Robt. (N. Y.) 539. In a time policy there is no implied warranty of seaworthiness, except at the port of departure; and hence, a failure to make necessary repairs at an intermediate port does not, as of course, discharge the insurer. *Hathaway v. Sun Mut. Ins. Co.*, 8 Bosw. (N. Y.) 33.

The owner of goods insured on board a vessel at sea is not liable for the act of the master in putting to sea from an intermediate port, in an unseaworthy condition. *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly (N. Y.), 246. A vessel is not seaworthy unless she is duly equipped and manned with a competent crew, engaged for the voyage insured. *Silva v. Low*, 1 Johns. Cas. (N. Y.) 84; *Dow v. Smith*, 1 Caines (N. Y.), 32. If a vessel has in fact a competent sailing master, she is not unseaworthy, although the registered master has no nautical skill, and acts only as supercargo; the Act of Congress has no effect upon the contract of insurance in that respect. *Draper v. Commercial Ins. Co.*, 21 N. Y. 378. If a vessel puts to sea, unprovided with necessary stores, she is not seaworthy. *Fontaine v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 58. The implied warranty of seaworthiness does not require that the vessel shall have all proper documents or papers on board; this is only material where there is a warranty or representation of national character. *Elting v. Scott*, 2 Johns. (N. Y.) 157. But a vessel is not deemed unseaworthy, if, in navigating a river, she omits to take a licensed pilot, if the master or mate possess the requisite skill, and the local law do not otherwise provide. *Keeler v. Fireman's Ins. Co.*, 3 Hill (N. Y.), 250. If the vessel was in fact unseaworthy at the time of sailing, it makes no difference that she was surveyed before sailing and pronounced competent. *Warren v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 231; *Barnewall v. Church*, 1 Caines (N. Y.), 217. And the fact of seaworthiness being a condition precedent to the policy attaching, the burden is upon the assured in the first instance to show the fact. *Moses v. Sun Mut. Ins. Co.*, 1 Duer (N. Y.), 159.

This implied warranty applies to the cargo as well as to the vessel. *Howard v. Orient Mut. Ins. Co.*, 2 Robt. (N. Y.) 539.

If, after the risk has attached, the vessel becomes unseaworthy and is permitted to remain so through the want of ordinary diligence on the

part of the assured, the insurer is discharged from all liability for a loss resulting from unseaworthiness. *Am. Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287.

NOTE 27. Express Warranties.—Stipulations in policies are express warranties, whether material to the risk or not. *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488. As the insurer has a right to impose any legal conditions upon the assumption of the risk by him, and having stipulated for a certain condition of things, he has a right to have such condition fulfilled, even though the risk was less hazardous without than with it. If, in an application for insurance upon a vessel it is described as then being in a certain port, such representation amounts to a warranty that the vessel at the time the risk is assumed is at such port in safety, and if not there at that time the policy is thereby avoided: *Calahan v. Atlantic Ins. Co.*, 1 Edw. Ch. (N. Y.) 64; and the fact that the assured made the representation in good faith believing it to be true does not change the result. Thus in *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray (Mass.), 221, the application stated that the vessel had arrived at her port of destination and was clear of her cargo, when in fact she was only just entering the harbor of that port, and it was held that the policy was avoided by this breach of warranty.

A statement that "orders will be given that the ship shall not cruise," is a warranty that *express orders* to that effect will be given, and if they are not the policy is avoided, although from orders given such an order might be implied. *Ogden v. Ash*, 1 Dall. (U. S.) 162.

If a policy contains a clause that "the insurers are not liable for seizures by a certain nation for illicit trade," and the vessel is seized and condemned by that nation for an attempt to trade illicitly, the underwriters are not liable for the loss. *Church v. Hubbard*, 2 Cranch (U. S.), 187. "Contraband goods of war" do not vitiate a policy warranted to be on goods that are "lawful." The insured are not bound to disclose that the goods insured are "contraband of war." *Seton v. Low*, 1 Johns. Cas. (N. Y.) 1. If the insurer and insured know that there are contraband goods on board, and yet insurance is effected on lawful goods with a warranty against contraband, the warranty applies only to the lawful goods. *Boune v. Shaw*, 1 Caines (N. Y.), 489. So in a policy on commissions upon lawful goods the warranty against contraband goods is not broken, though the assured is captain, and the contraband goods are shipped without the knowledge of the insurer. *De Peyster v. Gardner*, 1 Caines (N. Y.), 492. The trading by a domiciled alien carried on between the United States and the enemies of his mother country, is protected under the warranty against illicit trade. *Johnston v. Weir*, 1 Caines Cas. (N. Y.) 19. Indeed to constitute a breach of warranty against seizure or detention for illicit trade, the seizure must be for trade actually illicit or prohibited, and a seizure under pretext that the trade is illicit, when it is not so, is not

sufficient. *Johnston v. Ludlow*, 1 Caines Cas. (N. Y.) 29. Where the exportation of sugar was prohibited from the island of Antigua, but before the prohibition a vessel entered into the usual bond and began to load, and was afterwards regularly cleared, the president of the island supposing vessels thus situated not to come within the prohibition; the sugar was seized and condemned as forfeited for a breach of the laws of trade. It was held that the exportation of the sugar was illicit, and a breach of the warranty against illicit or prohibited trade contained in the policy of insurance on the sugar. *Tucker v. Jabel*, 1 Johns. (N. Y.) 20; *Mumford v. Phoenix Ins. Co.*, 7 id. 449; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404; *Faudel v. Phoenix Ins. Co.*, 4 S. & R. (Penn.) 29.

To render the commencement of the voyage illegal, so as to discharge the insurer, a knowledge of the embargo having been laid must be brought home to the masters or owners; a vague rumor, or knowledge by the pilot previous to the sailing of the vessel, will not be sufficient to charge the assured with notice that such act had been passed. *Walden v. Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310; *Dunham v. Am. Ins. Co.*, 12 Wend. (N. Y.) 463. In the margin of a policy the following clause appeared: "Warranted by the assured free from all claim for loss or damage arising from or growing out of the collision of foreign powers, or of our government with others." At the time this policy was effected, the domicile of the insurance company was in possession of insurgents, engaged in rebellion against the United States. The insurgent military commander ordered the burning of all the cotton in and about the city, by reason of which burning the vessel insured was destroyed by fire. It was held that the loss was not a peril insured against. *Marcy v. Merchants', &c. Ins. Co.*, 19 La. An. 388.

NOTE 28. Time of Sailing.—From what was said in the last note, it will be readily understood that if a vessel is insured, to sail upon a certain day, her failure to sail upon that day will amount to a breach of warranty and avoid the policy, although she sails as soon thereafter as possible. But if the policy covers a particular voyage or period of time, the fact that the assured did not state the time when the vessel would sail, unless the same is material to the risk, will not avoid the policy. *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188.

NOTE 29. Sailing with Convoy.—The warranty to sail with convoy is interpreted in accordance with known usages applicable thereto, and the natural and necessary incidents. It would be absurd to hold that such a warranty was broken because during the prevalence of a gale or of a storm the vessel and her convoy parted, so that she was left without convoy, and mercantile usage controls necessarily the construction of this warranty; but in this country there is no such thing as sailing with convoy.

NOTE 30. National character. Neutrality.— The ownership of a vessel determines her national character: *United States v. Jenkins*, 2 Law Rep. 146; and must be determined by the residence of her owners. *Hill v. The Golden Gate*, 6 Am. L. R. 273. The register is the only document which need be on board, during a period of universal peace, in compliance with a warranty of national character. *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.), 594; *Schwartz v. Ins. Co. of North America*, 3 Wash. (U. S. C. C.) 117; *Smith v. Delaware Ins. Co.*, id. 127; *Bayard v. Mass. & M. Ins. Co.*, 4 Mas. (U. S.) 256. Where there is a warranty of neutral character, it is not only necessary that the cargo should be, in truth, neutral, but also that no act of commission or omission should be done to jeopardize the claim, whether by the owner or his agents. *Calbreath v. Gracy*, 1 Wash. (U. S. C. C.) 219. A ship warranted to be American is impliedly warranted to conduct herself as an American, and an attempt knowingly to enter a blockaded port forfeits that character. *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch (U. S.), 185. A warranty that a vessel is neutral property is forfeited by anti-neutral conduct. But without such warranty, an attempt to enter a blockaded port does not avoid the policy. *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.), 29; *Schwartz v. Ins. Co. of North America*, 3 Wash. (U. S. C. C.) 117. If the interest of one joint owner of a cargo is insured, and that interest is neutral, it is not a breach of the warrant of neutrality that the other joint owner is a belligerent. *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.), 74. A merchant vessel taking a letter of marque does not avoid the policy, but a capture under it does, even though at the time the policy was issued the insurer knew the fact. *Wiggin v. Amory*, 13 Mass. 118; *Wiggin v. Boardman*, 14 Mass. 12.

Merely sailing for a port understood to be blockaded is not such a breach of neutrality as avoids a policy. *Vos v. United Ins. Co.*, 1 Caines Cas. (N. Y.) 7. In order to constitute a breach of a blockade the blockading force must be actually before the port, and if the blockading force has left, although *animo revertendi*, the blockade is not continued. *Williams v. Smith*, 2 Caines (N. Y.), 1. But an accidental removal of the blockading fleet by wind or storm does not suspend the blockade, and if a neutral vessel, with notice or knowledge of the fact, enters or attempts to enter the port, it is a breach of the blockade. *Radcliffe v. United Ins. Co.*, 7 Johns. (N. Y.) 38.

The purchase of a vessel by an alien, *to be transferred at a future day* to the assured, who is an American, does not create a breach of a warranty of American property: *Murgatroyd v. Crawford*, 3 Dall. (U. S.) 491; nor is the national character of the vessel changed by the sentence of a foreign court against its neutrality. *Sperry v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 243. If the vessel is described in the policy as a "prize vessel," and afterwards her national character is changed so as to increase the risk, the policy is thereby invalidated. *Seaman v. Loring*, 1 Mas. (U. S.) 127.

The designation of a vessel as the American brig, or the English brig, operates as a warranty that she is of the national character so designated, or at least that she is documented as such. *Barker v. Phenix Ins. Co.*, 8 Johns. (N. Y.) 307; *Higgins v. Livermore*, 14 Mass. 180; *Lewis v. Thacher*, 15 Mass. 432. The terms "British vessel" in a policy, if a warranty, are satisfied by the vessel's belonging to a Scotchman, who navigated her under a clearance and license from the British custom-house at New Providence. His habitual residence need not be proved. *Mackie v. Pleasants*, 2 Binn. (Penn.) 363. So a warranty that a vessel is an American bottom is satisfied if she is owned by an American and sails under a sea-letter. *Griffith v. Ins. Co. of North America*, 5 Binn. (Penn.) 464; *Ludlow v. Bourne*, 1 Johns. (N. Y.) 1; *New York, &c. Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 56. A warranty that a ship is American property imports not merely that she is American, but that she shall be accompanied with the documents requisite to show her national character. *Coolidge v. Fireman's Ins. Co.*, 14 Johns. (N. Y.) 308. Where goods were warranted American in a policy, it was held that the insured could not recover after an attempt by their captain or general agent to cover foreign goods, though such foreign goods were covered without the consent of the insured, and could easily be distinguished from the American. *Phoenix Ins. Co. v. Pratt*, 2 Binn. (Penn.) 308. A warranty of "American property" is proved by reputation, employment, and domicile. The owner's interest is proved by one who saw the original register in the owner's name, as the vessel was about to sail; the cargo, by one who sold the articles and saw them go on board. *Peyton v. Hallett*, 1 Caines (N. Y.), 363. When a vessel is described in a policy as an American ship, while she is conveyed in trust to secure the debt of a British subject, the warranty is broken, and the policy void. *Murray v. United States Ins. Co.*, 2 Johns. Cas. (N. Y.) 168. Proof that the vessel was owned by an American citizen, and had all the papers of an American vessel, except a register, having sailed with a sea-letter only, is sufficient evidence of a compliance with the warranty of American property. *Barker v. Phenix Ins. Co.*, 8 Johns. (N. Y.) 307. The register of a vessel is the only document which need be on board during a period of universal peace, in order to comply with a warranty of national character; and a duly certified copy thereof from the office of the register of the treasury, which in the case of the loss of the vessel is required to be deposited in that office, is legal evidence of such register. *Catlett v. Ins. Co.*, 1 Paine (U. S.), 594.

There is an implied warranty that the vessel and voyage insured shall be conducted according to law, and that the vessel, if not the cargo, is neutral. *Stacker v. Merrimac Ins. Co.*, 5 Mass. 220. If the insured warrants the property neutral, he is bound, not only to maintain it to be so, but so to conduct himself towards the belligerent parties as not to forfeit its neutrality. *Cleveland v. Union Ins. Co.*, 8 Mass. 308. If a belligerent emigrates to a neutral country *flagrante bello*, and is there

naturalized, a warrant of neutrality is supported by such naturalization, and he need not disclose to the underwriters the period of his emigration. *Duguet v. Rhinelanders*, 1 Caines Cas. (N. Y.), 25. A representation in a policy that the property insured is neutral, is equal to an express warranty that the property is neutral. *Walton v. Bethune*, 2 Brev. (S. C.) 453. In *Ellers v. United Ins. Co.*, 16 Johns. (N. Y.) 128, A. and B. were Swedish subjects, and partners in trade at St. Bartholomew's. In 1811 B. came to the United States, and in July, 1813, while B. was still in the United States, a policy of insurance was underwritten on account of A. and B. on cargo for a voyage from New Haven to St. Bartholomew's, warranted Swedish property. It was held that from the long previous residence of B. in this country, it was to be presumed that he intended to reside here permanently, which presumption it was incumbent on the insured to repel; and not having done so, B. was to be regarded as domiciled in the United States, and the warranty was not complied with.

In a warranty of neutrality, the insured are only understood as warranting that the interest insured is neutral. It is therefore no breach of the warranty if another joint owner, whose interest is not insured, is a belligerent. *Livingston v. Marine Ins. Co.*, 6 Cranch (U. S.), 274. A vessel may lawfully sail for a port known to be blockaded, until she is warned off. She is not bound to make inquiry elsewhere than of the blockading force. *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.), 29. It is a breach of warranty of neutrality that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property, and that all evidence to prove the neutrality of the vessel and cargo is concealed from the captors. In case of such warranty, it is not only necessary that the cargo should be in truth neutral, but also that no act of commission or of omission should be performed to jeopardize the claim to a neutral character, whether by the owner or by his agents. *Galbraith v. Gracy*, 1 Wash. (U. S.) 219. The warranty of neutrality is broken by unneutral conduct in the insured. *Schwartz v. Ins. Co. of North America*, 3 Wash. (U. S.) 117. But in a case of warranty of neutrality only, the parties have a view to the laws of nations and subsisting treaties, and the insured only engages that the property is neutral for the purpose of being protected; and in fulfilling this engagement, the insured can never be surprised by the want of all proper documents, except by his own neglect or fault. *Smith v. Del. Ins. Co.*, 3 Wash. (U. S.) 127. Having an enemy's license on board a vessel bound to a neutral port, will not avoid a policy of insurance upon the voyage. *Hayward v. Blake*, 12 Mass. 176.

NOTE 31. Fraudulent Misrepresentations. Concealment. — Contracts of insurance call for the exercise of mutual good faith, and the principles applied to them are those of enlightened moral policy, and the insurer has a right to presume that the assured has made known to

him all the facts material to the risk which are within his knowledge, and a concealment of facts which are material to the risk and known to the assured, and which the insurer is not bound to know, avoids the policy. *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170; *Banday v. Union Ins. Co.*, 2 Wash. (U. S. C. C.) 391; *Vale v. Phoenix Ins. Co.*, 1 id. 283; *Sperry v. Del. Ins. Co.*, 2 id. 243; *Moses v. Del. Ins. Co.*, 1 id. 385; *Brays v. Union Ins. Co.*, 1 id. 24; *Howell v. Ins. Co.*, 7 Ohio, 276; *Oliver v. Green*, 3 Mass. 133; *Ingraham v. Ins. Co.*, Treadw. (S. C.) 707; *Fisk v. N. E. Ins. Co.*, 15 Pick. (Mass.) 310; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.), 189.

The usual test is whether the facts concealed would, if known to the insurer, have induced him to charge a higher rate, or to have rejected the risk altogether. *Hoyt v. Gilman*, 8 Mass. 336; *Murgatroyd v. Crawford*, 3 Dall. (U. S.) 491. This does not require the assured to give the insurer any information which he may be presumed to know, but applies to those unusual uses, practices, etc., of which it cannot be presumed that the insurer had knowledge: *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235; nor to matters which are covered by a warranty, express or implied. *Bulkley v. Protected Ins. Co.*, 2 Paine (U. S.), 82.

If the assured has notice of a loss, he is bound to disclose it. *McLanahan v. Universal Ins. Co.*, *ante*; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 408; *Livingston v. Delafield*, 3 Caines (N. Y.), 49; *Patton v. Janney*, 2 Cranch (U. S. C. C.), 71. So he is bound to disclose everything which concerns the state of the vessel at any particular state of the voyage, material to the risk; *Coles v. Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159; when the voyage commenced: *Johnson v. Phenix Ins. Co.*, 1 Wash. (U. S. C. C.) 378; that the ship's papers disclose the true legal ownership: *Ohl v. Eagle Ins. Co.*, 4 Mas. (U. S.) 390; or indeed any fact relating to the risk which would have induced the insurer to have charged a higher rate, or to reject the risk. *Hoyt v. Gilman*, 8 Mass. 336. And the concealment of such facts will be fatal to the policy, although it was the effect of inadvertence or mistake, and without any actual fraudulent intent. *Union Ins. Co. v. Stoney*, Harp. (S. C.) 235. In *Archibald v. Mercantile Ins. Co.*, 3 Pick. (Mass.) 70, the assured unwittingly made a voyage which was prohibited by the revenue laws of a foreign country, for which the ship was condemned; it was held that the insurers, not knowing that an illicit voyage was contemplated, were not liable.

Where the assured has particular information of a severe storm which had occurred at the port to which the vessel was destined, it was held that his failure to disclose it to the insurer avoided the policy, although they had general information at the time the policy was issued that there had been severe gales off that coast. *Moses v. Del. Ins. Co.*, 1 Wash. (U. S. C. C.) 385; *s. p.* *Livingston v. Delafield*, 1 Johns. (N. Y.) 522. In *Kohne v. Ins. Co. of N. A.*, 6 Binn. (Penn.) 219, under a policy insuring goods from New York to Spain, describing them as products of South America,

It was held to be fatal to the plaintiff that he did not disclose that the goods had been brought from Lagaira in the same vessel, which had stopped at Charleston without unloading, thereby exposing the cargo to the British orders in council. In *Union Ins. Co. v. Stoney*, Harp. (S. C.) 235, insurance was effected on a vessel "at and from Charleston to Marseilles, and at and from thence to Havana." Another policy was made on the same day on the cargo, "from the loading thereof at Charleston." In the offer of the insured, on which both policies were effected, every material circumstance was said to be disclosed. The vessel had been laden at Havana, and had touched at Charleston, where the goods were not landed; and the manifest showed they were shipped in the names of Spaniards. It was held that the omission to disclose these facts (Spain and her colonies being then at war) was such a concealment of material circumstances as vitiated the policy on the vessel.

A knowledge of the state of the world, of the allegiance of particular countries, of the risks affecting their commerce, of the course and incidents of trade, of the terms used in their contracts, must necessarily be imputed to underwriters. *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 160; *Kohne v. Ins. Co.*, 1 Wash. (U. S.) 158; *Martin v. Del. Ins. Co.*, 2 id. 254; *De Longuemere v. New York Ins. Co.*, 10 Johns. (N. Y.) 120; *Marsh v. Muir*, 1 Brev. (S. C.) 134. Consequently the assured is not bound to disclose any information of that character, as they are presumed to possess it.

The assured is not, unless asked to do so, bound to disclose the age of the vessel, nor where she was built: *Poppleston v. Kitchen*, 3 Wash. (U. S. C. C.); nor the particular language of the bill of lading: *Hartin v. Phenix Ins. Co.*, 1 Wash. (U. S. C. C.), 406; nor, if authorized to touch at a particular port, that the vessel will stop there, although he knew the fact: *Hubbard v. Coolidge*, 2 Gall. (U. S.) 353.

The assured is under no obligation to disclose his own suspicions or opinions relative to the risk, but if he has any particular information relating and material thereto, he should disclose it. *Bell v. Bell*, 2 Camp. 479. In other words, he should disclose to the insurer the condition of the ship according to the last intelligence he received in reference to it. *Kimble v. Browne*, 1 Caines (N. Y.), 75; *Fiske v. N. E. Ins. Co.*, 15 Pick. (Mass.) 310; *Ely v. Hallett*, 2 Caines (N. Y.), 57; *Cason v. Smith*, 3 Wash. (U. S. C. C.) 156.

If facts are known to the insurer or are disclosed to him by the assured sufficient to put him on inquiry as to certain matters, and he neglects to make inquiry in respect thereto, or to call for further information, he is bound by the policy. *Alsap v. Commercial Ins. Co.*, 1 Sumn. (U. S. C. C.) 451. If inquiries are specially made of the assured as to certain matters, he must answer truly, and disclose all the facts relative thereto within his knowledge. *Poppleston v. Kitchen*, *ante*. But a general inquiry does not call for specific information. *Augusta, &c. Co. v. Abbott*, 12 Md.

348. The assured is not bound to disclose that his interest in the goods is undivided: *Turner v. Burrows*, 5 Wend. (N. Y.) 541; *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276; or the nature of the cargo: *Duplanty v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 157; or that the vessel has on board the usual and customary document. *Leroy v. United Ins. Co.*, 7 Johns. (N. Y.) 343. Every fact in the knowledge of the assured which enhances the ordinary risk, and would if disclosed enhance the premium, ought to be communicated to the underwriters; but this is limited to facts which the latter is not presumed to know, nor bound to notice. But an insurer, in a neutral country, is not bound to disclose to the underwriter that the insured goods are contraband of war: *Seton v. Low*, 1 Johns. Cas. (N. Y.) 1; nor to give information as to the topography of the places mentioned in the policy. The latter is bound to know that what is called a port on the coast of Yucatan is merely an open road or anchorage. *De Longnemere v. New York F. Ins. Co.*, 10 Johns. (N. Y.) 120. Nor need he disclose instructions given to the master, as to the best mode of pursuing his voyage, so as to avoid detention by cruisers: *Talcot v. Marine Ins. Co.*, 2 Johns. (N. Y.) 130; nor any circumstances relating to risks which are excluded by a warranty, express or implied. *Walden v. New York Firemen Ins. Co.*, 12 Johns. (N. Y.) 128; *De Wolf v. New York Firemen Ins. Co.*, 20 id. 214. A representation is the statement of a fact which is alleged to exist relative to the risk, and if material and false, avoids the policy. But if substantially true, it is sufficient to save the policy. Thus a representation that the assured has been a naturalized citizen since a particular year, does not mean that he was so in that year: *Coulon v. Bowne*, 1 Caines (N. Y.), 289; or, in time of peace, that a vessel will sail in ballast; but such a representation is substantially complied with, though a trunk of merchandise and ten barrels of gunpowder are laden on board, without the knowledge of the owner. *Suckley v. Delafield*, 2 Caines (N. Y.), 222.

If a vessel is represented as out "about nine weeks," when, in fact, she has been out ten weeks and four days, this is not a material misrepresentation, if the latter period is within the usual time of the voyage: *MacKay v. Rhineland*, 1 Johns. Cas. (N. Y.) 408; nor is a statement by the assured that he was informed of the vessel's sailing, and that she was out twenty-six days, a misrepresentation, though, in point of fact, she had been out twenty-seven days. *Williams v. Delafield*, 2 Caines (N. Y.), 329.

If the assured has information of a violent storm the day after his vessel sailed, and he only states that there has been blowing weather on the coast, it is a misrepresentation that will avoid the policy. *Ely v. Hallett*, 2 Caines (N. Y.), 57.

A representation to one underwriter is not evidence of a subsequent representation to a different underwriter on another policy, though on the same vessel, and against the same risks. *Elting v. Scott*, 2 Johns. (N. Y.)

157. Where, at the time of making an application for insurance, a representation was made that "no spirits would be allowed on board," the fact that there were two kegs of spirits on board, belonging to the master, which were not put on board for use, nor in fact used, will not avoid the policy. *Irving v. Sea Ins. Co.*, 22 Wend. (N. Y.) 380. An insurance effected after a loss is valid, in the absence of fraud, if the master used ordinary diligence to communicate with the owners. *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32. And the fact that the loss of a vessel is known in the place early in the morning of the day on which a policy is effected at noon, is not conclusive proof of fraud in the assured, though the information is brought by some of the vessel's crew, if it does not appear that they had been on shore. *Livingston v. Delafield*, 3 Caines (N. Y.), 49; *Watson v. Delafield*, 2 Caines (N. Y.), 224. So, general intelligence contained in a public gazette, and bearing upon the subject-matter, must be disclosed to the insurers: *Dickenson v. Commercial Ins. Co.*, Anth. N. P. (N. Y.) 126; and an underwriter, procuring a re-insurance, is bound to communicate any information he may possess in regard to the character of the party insured. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359. A policy is not avoided by an excessive valuation of the interest insured, if made in good faith. *Huth v. New York Mut. Ins. Co.*, 8 Bosw. (N. Y.) 538. But if goods are insured at a sum enormously in excess of their cost, or their market value, it is such a concealment as avoids the policy. *Sturm v. G. & Western Ins. Co.*, 40 How. Pr. (N. Y.) 423.

A representation differs from a warranty in that the one is collateral to the policy, and must be substantially correct, while the other makes a part of it, and must be strictly and literally performed: *Clark v. Manufacturers' Ins. Co.*, 2 W. & M. (U. S.) 472; *Nicoll v. American Ins. Co.*, 3 W. & M. (U. S.) 530; and if any fact material to the risk is misrepresented, either through fraud, mistake, or negligence, the policy is avoided. *Carpenter v. American Ins. Co.*, 1 St. (U. S.) 57; *Clark v. Manufacturers' Ins. Co.*, 2 W. & M. (U. S.) 473; *Bulkley v. Protection Ins. Co.*, 2 Paine (U. S.), 82. But a mere expression of an opinion by the assured cannot amount to a material representation; it is the duty of the insurer to inquire into the grounds of such opinion. *Clason v. Smith*, 3 Wash. (U. S. C. C.) 156.

A letter from a merchant in New York to his correspondent in Boston, ordering insurance on a vessel belonging to, and then in the port of New York, and containing a statement that the ship was "coppered," will be construed with reference to the New York meaning of the term. *Hazard v. N. E. Marine Ins. Co.*, 8 Pet. (U. S.) 557. A representation that the cargo is to be covered as American, is substantially complied with if it was in fact American. *Hughes v. Union Ins. Co. of Baltimore*, 8 Wheat. (U. S.) 294.

A policy "for whom it may concern" will, in general, cover belligerent

property; but a misrepresentation that the property is neutral will vary the effect of the policy. *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151; *Hodgson v. Marine Ins. Co.*, 5 Cranch (U. S.), 100; *Straas v. Marine Ins. Co.*, id. 343.

If an agent, in procuring insurance, represents that the ship was not to sail until four days *after* another vessel, which came from the same port and had arrived, and in point of fact she had sailed four days *before*, the difference of sailing is material to the risk, and the policy is void. *Baxter v. N. E. Ins. Co.*, 3 Mas. (U. S.) 96. An *innocent* misrepresentation, in order to avoid the policy, must have reference to the *risk of the voyage*. *Hodgson v. Marine Ins. Co.*, 1 Cranch (U. S. C. C.), 460; *Straas v. Marine Ins. Co.*, *ante*.

A representation as to the destination of a ship, if true when made, and not fraudulent, does not avoid the policy, though the destination is afterwards changed. *Hubbard v. Coolidge*, 2 Gall. (U. S.) 353. If a party make a representation on the information of others, and so states it, the policy is not avoided, though the fact is not so, if he gave his information truly. *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mas. (U. S.) 439; *Biays v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 506.

The *accidental* concealment of the time of sailing, unless material to the risk, would not prejudice the insurance. *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188. If a policy authorizes the ship to stop at a particular port, the assured need not disclose that the ship will call there, although he has information of the fact. *Hubbard v. Coolidge*, 2 Gall. (U. S. C. C.) 353.

The concealment of the fact that a ship upon which a policy of insurance is effected, is in command of a master who sails her at halves, manning and victualling her and paying her port charges, does not avoid the policy. *Russ v. Waldo, &c. Ins. Co.*, 52 Me. 187.

Where an order for insurance is against all risks, for account of all whom it may concern, upon a certain defined voyage, the insured is not bound to communicate or disclose, at the time of effecting such insurance, without inquiry from the underwriter, the particular circumstances connected with the voyage, which show that it is in fact a belligerent risk, as the transportation of hostile stores, troops, &c. His obligation to disclose is limited to such facts as would vary the risk or nature of the contract; no communication need be made of what is necessarily implied by the contract. *Ins. Co. v. Bathurst*, 5 G. & J. (Md.) 159.

He is not bound to disclose his title to the insurer, unless it is asked for. *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *Locke v. North American Ins. Co.* 13 Mass. 61. *Bartlett v. Walter*, 13 Mass. 267; *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 535. And generally mere silence concerning a material fact known to the insurer, if no inquiry is made, will not avoid the policy. *Greene v. Merchant's Ins. Co.*, 10 Pick. (Mass.) 402; *Money v. Union Ins. Co.*, 4 McCord (S. C.), 511. So where the

insured exhibiting to the insurer an extract from a letter, and the insurer not asking to see the whole letter, there is no material concealment. *Loving v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 418. He is not bound to disclose the nature of the cargo; it is the duty of the insurer to inquire as to it: *Duplanty v. Commercial Ins. Co.*, Anth. (N. Y.) 114; nor how long the vessel has lain in port before obtaining the policy: *Kemble v. Boune*, 1 Caines (N. Y.), 75; nor the amount of his interest in the policy. *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276. Where a policy contains no warranty of neutrality, or of the character of the vessel, the assurers take upon themselves all risks, belligerent as well as neutral, and the concealment of the fact that the assured resided in a belligerent country, and of his interest, is not material. *Elting v. Scott*, 2 Johns. (N. Y.) 157. If the vessel has on board a document usual and customary in the course of the trade in which she is engaged, although it may expose her to capture and condemnation, it need not be disclosed. *Leroy v. United Ins. Co.*, 7 Johns. (N. Y.) 343. Nor is the assured bound to disclose circumstances relative to the seaworthiness of the vessel, or facts showing carelessness and want of economy in the master, provided they do not tend to impeach his honesty: *Walden v. Firemen Ins. Co.*, 12 Johns. (N. Y.) 128; nor any facts as to which there is a warranty, express or implied. *N. Y. Firemen Ins. Co. v. De Wolf*, 2 Cow. (N. Y.) 58. A policy is not vitiated by the mere omission of the insurers to state who are the owners of the vessel by which the goods are to be carried, and no inference can be fairly drawn from a statement in a policy that the underwriters insure S. G. C. & Co., on merchandise by certain boats named, that they are owners of the boats. *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595.

If for fraudulent purposes, the assured avoided obtaining a full and true disclosure of the facts material to the risk, the consequences would be the same as if he had misrepresented the information given him. *Biays v. Union Ins. Co.*, 1 Wash. (U. S.) 506. In an action against an insurance company on a policy of insurance, it is for the defendant to prove that the time of sailing was material to the risk, and that the plaintiffs withheld the information. *Fiske v. New England M. Ins. Co.*, 15 Pick. (Mass.) 310. Where a party insuring a flatboat believes her out of time, and, though entertaining doubts, has reasonable ground to believe her wrecked, a concealment of these facts vitiates the policy. *Graham v. General Ins. Co.*, 6 La. An. 432. He is not bound to anticipate every possible ground of suspicion which may against right weigh with the belligerent cruisers and courts, and to communicate the circumstances; although, if against right the belligerent courts are in the habit of condemning property, under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk. *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 357. If he intends to insure a special or equitable ownership, he must give notice to

the underwriter. A common policy on a ship covers only the legal ownership. *Ohl v. Eagle Ins. Co.*, 4 Mas. (U. S.) 390. Compare *Locke v. N. American Ins. Co.*, 13 Mass. 61; *Riley v. Delafield*, 7 Johns. (N. Y.) 522. He should inform the insurer, if though he has an interest he has no such title to the property as will authorize him to transfer it by abandonment. *Locke v. N. American Ins. Co.*, 13 Mass. 61. But the fact that the captain wrote to his owner from a foreign port, stating his loss, without any other proof of the reception of the letter, will not authorize an inference that the letter was received, so as to charge him with notice. *Oliver v. Newburyport Ins. Co.*, 3 Mass. 37. It is question of fact whether a certain newspaper had been received and its contents known at an insurance office, before the president had signed a policy; and also whether the information in the newspaper was the same as that contained in the letter of application for insurance. *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402. General intelligence contained in a public gazette, and bearing upon the subject-matter of insurance, must be disclosed to the insurers, although they are subscribers to the paper. *Dickenson v. Commercial Ins. Co.*, Auth. (N. Y.) 92. The master of a vessel insured to Martinique, without specifying the port, was instructed by his owner to keep well to the eastward, and to endeavor to make a particular port in M., and if he should be turned away by a cruiser, then to go to L. and take the first opportunity to go to M. These instructions were not made known to the insurer, and it was held an immaterial concealment. *Talcot v. Marine Ins. Co.*, 2 Johns. (N. Y.) 136. A vessel of which the master was part-owner was cast away and lost about ninety miles from the port of destination, where the other partners resided, who, after the loss and before notice of it, had insurance made. There being no actual fraud in the case, it depended on the question of constructive fraud, on the ground that the captain had not used due diligence in communicating intelligence of the loss. It was held that the master, not having directed insurance or been apprised of any intention to insure, was bound to exercise ordinary diligence only. *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32.

NOTE 32. Concealment. — As to what is, and when avoids policy, see **NOTE 31.** The mere omission of certain facts from the application is not necessarily evidence of a concealment of them: *Folsom v. Mercantile Ins. Co.*, 9 Blatch. (U. S. C. C.) 201; and the burden is upon the insurer of establishing that the assured not only knew the facts, but also that he concealed them. *Clement v. Phoenix Ins. Co.*, 6 Blatchf. (U. S. C. C.) 481. If a policy is effected after a loss, knowledge of the fact of the loss by one who is not the agent of the assured for any purpose connected with the insurance, is not notice to the assured, and the neglect of the master to notify the owner of a loss, by telegraph, will not avoid the policy. *Folsom v. Mercantile Ins. Co.*, 8 Blatchf. (U. S. C. C.)

170. But if the assured knew of the loss at the time of his application for the renewal of a former policy, and withheld that fact from the underwriters, he cannot set up a prior verbal contract to renew the policy, made before its expiration; the insurers were entitled to the information possessed by the assured of the previous loss of the vessel; and the latter, having destroyed the validity of the written contract by his own fraud, cannot repudiate it, and recover on the prior verbal agreement. *Merchants' Mut. Ins. Co. v. Lyman*, 5 Chicago Leg. News, 493.

NOTE 33. Risks covered by the Policy. — There is no statute, ordinance, or regulation either in this country or Great Britain, as to the time when a policy attaches to the risk, and this matter is regulated by the policy itself, which should always describe with reasonable certainty the time when the insurance begins and when it ends. In *Hills v. Rhenish &c. Ins. Co.*, 39 Hun (N. Y.), 552, a policy covered all shipments from ports and places . . . in Europe generally, to New York and to Atlantic ports in the United States, direct or by port or ports, with privilege of transshipment by steamer, sailing vessel, and other conveyances, including all risks of lighterage, one half interest in dried fruits or other merchandise, each kind of goods separately, dried fruits and other merchandise, by steamer to be insured free from particular average, unless the vessel be stranded, sunk, burned, or in collision. It was held that "all risks of lighterage" meant any loss, partial or total, by lighterage, while the loss by it was limited, and to be free from particular average.

A policy which excepts loss from the bursting of boilers, but covers that "occurring subsequent to, and in consequence of such bursting," does not cover a total loss occasioned by an explosion so violent as to tear open the sides of the vessel, so as to sink her in a few minutes. *Evans v. Columbian Ins. Co.*, 44 N. Y. 146. In *Pratt v. Ins. Co.*, 9 Bosw. (N. Y.) 97, the defendants underwrote two open policies, to cover property to be indorsed thereon, not exceeding a certain sum. It was held that a certificate issued under the second policy was not invalidated by the fact that prior insurances, purporting to be made under the first policy, exceeded in the aggregate the whole sum named in both policies. The acceptance by several insurance companies of applications for insurance upon a cargo in progress of shipment, the value of which is unknown, in each case not to exceed a specified amount, according to a course of dealing between the parties renders them liable, in case of a loss, for a proportionate part thereof; and such a course of dealing may be shown by evidence *aliunde*. *Fabbri v. Mercantile Mut. Ins. Co.*, 6 Lans. (N. Y.) 446; *Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129. A policy upon a new ship, still upon her ways, "while being safely launched" and "until she be moored twenty-four hours in safety," is to be construed according to the manifest intention of the parties; it protects the assured, from the moment the launching commences, against accidents in the progress of that work

not arising from negligence, fraud, ignorance, or misconduct of those in charge of the vessel. *Frichette v. State Mutual F. & M. Ins. Co.*, 3 Bosw. (N. Y.) 190. An insurance upon the freight of a vessel, then in the China seas, provided that the voyage should be confined to the trade between Atlantic ports of the United States, or the ports of London, Liverpool, and Havre and the Pacific Ocean, China seas, including Australia, Van Diemen's Land, and ports in the Indian Ocean. It was held that this did not, as matter of law, extend to a voyage made by the vessel from Liverpool to New York, on her return from the China seas. *Malory v. Commercial Ins. Co.*, 9 Bosw. (N. Y.) 101. The clause "free from, average under seven per cent, unless general" protects the underwriter from liability for all losses except an actual, as distinguished from a technical total loss; in such case, the assured can recover for general average only. *Le Roy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226; *Maggrath v. Church*, 1 Caines (N. Y.) 96; *Neilson v. Columbian Ins. Co.*, 3 id. 108; *Guerlain v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 527; *Saltus v. Ocean Ins. Co.*, 14 id. 138; *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204. In *Bakewell v. Ins. Co.*, 2 Johns. Cas. (N. Y.) 246, a policy contained a memorandum "that salt, &c., and all articles that are perishable in their own nature, are warranted by the assured free from average, unless general; and sugar, &c., skins, hides, and tobacco are warranted free from average under seven per cent, unless general;" a quantity of *deer skins*, part of the cargo, were damaged, by which a loss of ten per cent on the cargo was occasioned; and it was held that the deer skins were included in the clause relative to skins and hides, and that the assured was entitled to recover. But where "dried fish" were enumerated in the memorandum, as free from average, unless general, as also "all other articles perishable in their own nature;" it was held not to be applicable to "pickled fish." *Baker v. Ludlow*, 2 Johns. Cas. (N. Y.) 289.

Where the insurance is upon a quantity of hay, the memorandum clause will apply to the entire cargo, and not to each separate bale. *Hainings v. Lamar F. Ins. Co.*, 7 Leg. & Ins. Rep. 397. Where the exception in the memorandum clause is broad enough to include other losses beside those arising from inherent decay, the insurer is entitled to exemption from every risk plainly and explicitly included within the terms of the exception. *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33. The saving of a very small proportion of the articles in the memorandum clause will not prevent a recovery for a total loss. *Bryan v. New York Ins. Co.*, 25 Wend. (N. Y.) 617. Perishable articles included in the memorandum clause are deemed totally lost, though existing in specie, if so injured by the perils insured against as to be incapable of transportation to the port of destination, without endangering the lives of the crew or the safety of the vessel. *De Peyster v. Sun Mut. Ins.*, 19 N. Y. 272. In *Woodruff v.*

Ins. Co., 2 Hilt. (N. Y. C. P.) 122, a cargo of grain was insured "warranted by the assured free from damage or injury from dampness, &c., except caused by actual contact with sea water;" one portion of it was damaged by actual contact with sea water, and another portion by dampness communicated from that part of the cargo which was actually wet; and it was held that the assured was entitled to recover for both portions of the cargo so damaged. But in such case, the assured cannot recover for damage caused by the effluvia arising from putrid hides, which formed part of the lading of the vessel. Where there is a contradiction between the written and the printed words in a policy, the former must control. *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatchf. (U. S. C. C.) 317. Thus a policy of insurance on boxes of lemons, valued at so much per box, "free from average unless general," is not an insurance of each box separately, but an entire contract of insurance on the whole number of boxes. *Hernandez v. New York Mut. Ins. Co.*, 6 Blatchf. (U. S. C. C.) 326. A policy issued by the duly authorized agent of an insurance company is not avoided by a subsequent memorandum, signed by the assured, that "the insurance in this application is to take effect when approved by A. B., general agent;" the contract is binding until a return of the premium note and cancellation of the policy. *Ætna Ins. Co. v. Webster*, 6 Wall. (U. S.) 129. The term "war risk" in a policy, wherein the government is the insurer, cannot be extended beyond the acts of the public enemy or the casualties of war; the government does not insure against its own acts. *Bogert v. United States*, 3 N. & H. (U. S.) 18. Where the insurer attempts to discharge himself from liability, by recovering and repairing, the vessel must be tendered in such a condition as to give the insured a full indemnity for the injury covered by the policy. *Copeland v. Ins. Co.*, 9 Wall. (U. S.) 461. A warranty "not to load more than her registered tonnage" is broken, though the extra freight be used as dunnage; otherwise, if it be mere dunnage, and not cargo paying freight. *Great Western Ins. Co. v. Thwing*, 13 Wall. (U. S.) 672. A policy including a prior period of time covers a loss already incurred, without the words "lost or not lost." *Folsom v. Mercantile Mut. Ins. Co.*, 8 Blatchf. (U. S. C. C.) 170.

See NOTE 25.

NOTE 34. Custom and Usage.—All written instruments are subject in their construction to such effect as may be derived from any custom or usage relating to the subject-matter which they cover, and marine policies are peculiarly open to the application thereof. *Louisiana Mut. Ins. Co. v. N. O. Ins. Co.*, 13 La. An. 246; *Macomber v. Parker*, 13 Pick. (Mass.) 173; *Harris v. Nichols*, 5 Munf. (Va.) 483. Such usages are treated as being impliedly incorporated into the contract. *Mobile Marine Ins. Co. v. McMillan*, 27 Ala. 77; *Renner v. Bank*, 11 Wheat. (U. S.) 581. In *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383, the vessel delayed

at St. Thomas for seventy days to sell its cargo, and it was claimed that this constituted a deviation which avoided the policy. STORY, J., said:

“Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation, depends upon the nature of the voyage and the usage of the trade. It may be a very justifiable delay to wait in port and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if *bonâ fide* made, cannot be admitted to avoid the insurance. In the present case it is proved that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But it is said that a sale might have taken place at St. Thomas of the whole cargo, if the orders of the owner had not contained a direction to the master limiting the sale at St. Thomas to the price of eight dollars, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought under the circumstances to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance or the rights of the party under it. It cannot be that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise, in this as in all other cases, a sound discretion for the interest of all concerned; and if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time and with all proper dispatch, as it is for the underwriters'. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly.

“ But it is said that there is no sufficient evidence of the usage of trade in the present case. It is to be remembered that this is a case which comes before this court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this court, as recognized in *Pawling v. The United States*, 4 Cranch (U. S.), 219, and *Fowle v. Alexandria*, 11 Wheat. (U. S.) 320. The testimony in the present case does not in direct terms (as has been justly stated at the bar) establish the general usage of the West India trade. The witnesses do not, generally, speak to a usage *eo nomine*. But it cannot be denied that its scope and object are to establish the usage, by an enumeration of facts and voyages by persons experienced in the trade, and referring to their own knowledge and general information. It thus conduces indirectly to prove the usage; and as it is altogether one way it is certainly such that a jury might infer a usage from it. And if so, this court may infer it. We consider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this court can infer that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit that the delay amounted to a deviation. The case of *Oliver v. Maryland Ins. Co.*, 7 Cranch (U. S.), 487 is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The court below instructed the jury that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was of opinion that the instruction was, in substance, correct. The only difficulty which arose was from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period regulated by the usage of trade. The chief justice there said: ‘There is some doubt spread over the opinion in this case in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port or of a trade are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports and all trades. The length of time frequently employed in selling one cargo and procuring another may assist in proving that a particular

vessel has or has not practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems to have been understood, that the plaintiff could not recover unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be evidence.' This case, therefore, recognizes the right to wait in port for the purpose of selling one cargo and procuring another; and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove that the usage and course of trade are very material to determine whether the delay be unreasonable or not." *Coggeshall v. Am. Ins. Co.*, 3 Wend. (N. Y.) 283; *The Reeside*, 2 Sumn. (U. S.) 567. But a usage must not be in opposition to the principles of law. *Bryant v. Com. Ins. Co.*, 6 Pick. (Mass.) 131; *Homer v. Dorr*, 10 Mass. 26; *Robertson v. Ins. Co.*, 19 La. 227; *Eyre v. Marine Ins. Co.*, 5 W. & S. (Penn.) 116; *McGregor v. Ins. Co.*, 1 Wash. (U. S. C. C.) 39; *Hermann v. Western F. & M. Ins. Co.*, 15 La. 517; *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S. C. C.), 603; *Smetz v. Kennedy, Riley* (S. C.), 218; *Leach v. Perkins*, 17 Me. 462; *Seecomb v. Provincial Ins. Co.*, 10 Allen (Mass.), 305; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Smith v. Wright*, 1 Caines (N. Y.), 45; *Trott v. Wood*, 1 Gall. (U. S. C. C.) 443; *Winsor v. Dellaway*, 4 Met. (Mass.) 223; *Bentaloe v. Pratt, Wall.* (U. S. C. C.) 64; *Loring v. Guernsey*, 5 Pick. (Mass.) 15; *Mason v. Franklin F. Ins. Co.*, 12 G. & J. (Md.) 468.

NOTE 35. Negligence. Barratry.—Unless expressly stipulated to the contrary, the underwriter is liable for losses resulting from negligence not amounting to barratry. *Richelieu, &c. Co. v. Boston Mut. Ins. Co.*, 26 Fed. Rep. 596; *General Mut. Ins. Co. v. Sherwood*, 14 How. (U. S.) 351. Mere negligence is one of the perils insured against, and it is no defence to an action on the policy to show that the loss happened by the carelessness of the agents of the assured. *Perrin v. Protection Ins. Co.*, 11 Ohio, 146; *Henderson v. Ins. Co.*, 10 Rob. (La.) 164; *Enterprise Ins. Co. v. Parisat*, 35 Ohio St. 35. But if the negligence consists in allowing the vessel to become unseaworthy, and she is lost by reason of such unseaworthiness, there can be no recovery. *Enterprise Ins. Co. v. Parisat, ante*.

The negligence of the master and crew is not barratry: *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; nor is an act done by the master, with an intent to benefit the owner. *Dederer v. Ins. Co.*, 2 Wash. (U. S. C. C.) 61. But a loss intentionally or wilfully incurred by the master and crew is barratry. *Waters v. Merchants' &c. Ins. Co.*, 11 Pet. (U. S.) 213.

To constitute a barratry there must be a fraudulent intent. *Walden*

v. New York Firemen Ins. Co., 12 Johns. (N. Y.) 513; *Grim v. Phoenix Ins. Co.*, 13 id. 451; *Sturm v. Atlantic Mut. Ins. Co.*, 6 J. & Sp. (N. Y.) 281. But barratry may be committed by the master, in respect to the cargo, although the owner of the cargo is at the same time owner of the ship, and the master is also supercargo or consignee for the voyage. *Cook v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 40. If the policy, in express terms, insures against thieves, &c., barratry of the master and mariners, &c., a loss by theft is covered, whether committed by the crew or others. *Am. Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 563. If goods are improperly stowed on deck, and jettisoned to save the vessel, this is not a loss by barratry of the master. *Atkinson v. Great Western Ins. Co.*, 4 Daly (N. Y. C. P.) 1. Nor will a fraudulent sale and purchase by the master constitute such an ownership in him as to afford a defence to a claim for a loss, by his barratry, but a person contracting and dealing with a master, who had purchased his owner's vessel at public sale, may recover, under a count for barratry, a loss occasioned by the fraudulent conduct of such master. *Steinbach v. Ogden*, 3 Caines (N. Y.), 1. If the insured is informed by the master that he is pursuing another voyage than that insured, and does not disapprove of it, it is only a deviation, and not barratry; although the master ultimately runs away with the ship, sells her, and embezzles the proceeds. *Thurston v. Columbian Ins. Co.*, 3 Caines (N. Y.), 89. In *McIntyre v. Bowne*, 1 Johns. (N. Y.) 229, A. chartered a vessel to B. and C. for a particular voyage, reserving half the cabin and certain privileges for the master and mate, and covenanted to hire and pay the master and crew, and furnish them with provisions, &c.; the master, at the request of B., who was on board, went out of his course, and was captured; it was held that A. continued owner for the voyage, and that the deviation was an act of barratry in the master, for which the insurers were liable. If the master by a charter-party become the owner *pro hac vice*, the underwriters cannot be made liable for a loss occasioned by what would otherwise be his barratry; one who is master and owner cannot commit barratry. *Hallett v. Columbian Ins. Co.*, 8 Johns. (N. Y.) 272. The usual clause in a marine policy, "unless the assured be owner or part owner of the vessel," refers exclusively to a loss by barratry; and therefore in an action for a loss by barratry, it is a good plea that the assured were owners or part owners. *Harris v. Mercantile Ins. Co.*, 17 How. Pr. (N. Y.) 188.

An honest misconstruction of his orders by the master, or an error in carrying them into effect, or a deviation through ignorance and without any fraudulent intent, or the violation of a blockade through ignorance of the law, is not barratry. *Dederer v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 61. But a deviation for the private purposes of the captain, or a loss incurred through the intentional violation of law by the master or mariners, the wilful violation of a blockade: *Vas v. Ins. Co.*, 2 Johns. Cas. (N. Y.) 180; *Calhoun v. Ins. Co.*, 1 Binn. (Penn.) 293; *Wilcocks v.*

Union Ins. Co., 2 Binn. (Penn.) 574; or of an embargo, cruising illegally and contrary to orders, rescuing a neutral vessel: *Dederer v. Del. Ins. Co.*, *ante*; trading with a public enemy, or collusion between the captain and a privateer, resisting a lawful search, are barrators' acts.

NOTE 36. Loss covered by the Policy. — In order to entitle a person to recover on a policy, the loss must be occasioned by some one of the perils insured against: *Coles v. Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159; *Swan v. Union Ins. Co.*, 3 Wheat. (U. S.) 168; *Smith v. Universal Ins. Co.*, 6 id. 176; and it is the proximate, not the remote, cause of the loss which determines the liability of the underwriter. Hence, where the vessel was condemned in damages for a collision occasioned by the negligence of the master and crew, it was held that the insurers were not responsible. *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 99. The maxim *causa proxima non remota spectatur* is the general rule for determining the liability of the underwriter, but the parties may, by express stipulation, agree upon another rule of responsibility. *Savage v. Corn Exchange Ins. Co.*, 4 Bosw. (N. Y.) 1; *Magoun v. Ins. Co.*, 1 Story (U. S.), 157; *Phenix Ins. Co. v. Cochran*, 51 Penn. St. 143; *Merchants' Ins. Co. v. Butler*, 20 Md. 41; *Natchez Ins. Co. v. Stanton*, 10 Miss. 340. If the peril insured against was the proximate, though not the immediate cause of the loss, the insurers are liable. *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332. Thus if a vessel receives her death-wound on the voyage, so as not to be worth repairing, the assured is entitled to recover, though she arrives at her port of destination. *Stagg v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 34. And the liability for a loss attaches from the time the vessel receives a fatal injury, rendering her destruction inevitable, though by great exertions she is kept afloat for some time after the injury, and in the mean time the assured in ignorance of the fact has transferred his interest to another. *Duncan v. Great Western Ins. Co.*, 3 Keyes (N. Y.), 394; *Crosby v. Mut. Ins. Co.*, 5 Bosw. (N. Y.) 369. The insurers are not liable for a loss occasioned by the negligence of the servants of the insured, not amounting to barratry, such as damages occasioned by collision with another vessel. But if the loss is caused by a peril of the sea, they are liable, though the master did not use due care to avoid it. *General Mut. Ins. Co. v. Sherwood*, 14 How. (U. S.) 351. If the immediate cause of the loss is a peril insured against, it is no defence that it was remotely caused by the negligence of the master or crew. *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. And a loss occasioned by the want of that degree of care and prudence which a skilful and prudent master would exercise in similar circumstances, is not covered by the policy. *Howland v. Marine Ins. Co.*, 2 Cranch (U. S. C. C.), 474. If the ship is so disabled by a storm as to become unmanageable, and thereby her boat is lost, the loss is properly attributable to the storm, although the cause of it did not occur during its actual continuance.

Potter v. Ocean Ins. Co., 3 Sumn. (U. S.) 27. The assured is not responsible for the conduct of third persons, done in consequence of a disaster occurring in a voyage; as where an American consul, after the death of the captain and officers, sent the vessel home, under the command of a foreign subject, and she was lost on the voyage home. *Winthrop v. Union Ins. Co.*, 2 Wash. (U. S. C. C.) 7. If a vessel, by the perils insured against, is rendered unable to proceed with her original cargo, it is a loss of the voyage, though she might be equal to perform it with another, more buoyant. *Abbott v. Broome*, 1 Caines (N. Y.), 292.

If the cargo, consisting of live stock, is injured by perils of the sea, and one of them dies from the injuries after being landed, the assured is entitled to recover; the condition of the cargo when landed is the criterion. *Coit v. Smith*, 3 Johns. Cas. (N. Y.) 16. In judging whether a vessel was lost on the voyage insured, the *usual* length of such voyage is the criterion. Thus in an action on a time policy, if two storms are shown, one within and the other without the period, it is for the jury to say which occasioned the loss. *Brown v. Neilson*, 1 Caines (N. Y.), 525. If a vessel is driven into a port of necessity, and a pestilential disorder breaks out, which renders it impossible for her to pursue her voyage, it is a loss within the meaning of the policy. *Williams v. Smith*, 2 Caines (N. Y.), 1.

If a vessel is blown from her moorings in port, and stranded in a place where she is destroyed by a belligerent force, this is a loss of the vessel by sea risk: *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9; but the rule is otherwise as to the cargo. *Patrick v. Commercial Ins. Co.*, *id.* 14. Where a vessel, after discharging her cargo, is obliged to go into dock for repairs, the underwriters are not liable for the wages and provisions of the master and crew during the period of detention. *Dunham v. Commercial Ins. Co.*, 11 Johns. (N. Y. 315). Nor is the underwriter liable for a loss, where the necessity for an abandonment, though real, was the result of the culpable negligence or want of due diligence on the part of the owner in furnishing the master with the ordinary means of obtaining funds or credit. *American Ins. Co. v. Ogden*, 20 Wend. (N. Y.) 287.

Where the underwriter insures goods upon a clean bill of lading, and they are stowed upon deck, without his knowledge or consent, the policy never attaches; and if the goods are jettisoned to save the vessel, he is not liable. *Atkinson v. Great Western Ins. Co.*, 4 Daly (N. Y. C. P.), 1. If worms ordinarily assail and injure vessels on the voyage insured, a loss by them is not within the policy. If a vessel take ground, and is injured and is thus exposed to worms, by which she is destroyed, such destruction is attributable, not to her injury by stranding, but to worms, provided the master neglected to make repairs. *Hazard v. N. E. Marine Ins. Co.*, 8 Pet. (U. S.) 557; *Coles v. Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159.

In all cases the underwriters on a common policy are liable for all accidents arising from extraordinary circumstances, and not from the

inherent weakness of the vessel. Thus where an accident occurs in the ordinary grounding of a vessel in a harbor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause for which the insurers are liable. To constitute a stranding, within the policy, the vessel must be on the strand under extraordinary circumstances. A loss by the ebbing of the tide is a loss by the perils of the sea, if not mere wear and tear, but extraordinary in its nature or mode. *Potter v. Suffolk Ins. Co.*, 2 Sumn. (U. S.) 197. But if the loss arose from the ordinary circumstances of the voyage, or from sea damage, or wear and tear, the insurer is not liable. *Coles v. Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159. A loss by collision without fault on either side is a loss by the perils of the sea for which the underwriters are liable. The rule is that whenever the thing insured becomes, by law, directly chargeable with any expense, contribution, or loss in consequence of a particular peril, the peril, for all practical purposes, is the proximate cause of such expense, contribution, or loss, and underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause not immediately connected with the peril. *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 99.

A collision on the high seas, whether it results from accident or negligence, is a peril of the seas, within the meaning of a policy of insurance, and all expenses resulting as a direct and immediate consequence of a peril insured against are covered by the policy. *Hale v. Washington Ins. Co.*, 2 Story (U. S.), 176. If the policy cover the risk of barratry, and fire is the proximate cause of the loss, it is no defence that the negligence of the master and crew was the remote cause. If profits are insured, on proof of a total loss of the cargo the assured may recover the amount insured on profits, without proof that any profits would have otherwise been made. *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 222; *Potter v. Suffolk Ins. Co.*, 2 Sumn. (U. S.) 197. If a vessel is in want of repairs, at the time of being insured, but not to such an extent as to render her unseaworthy, in case of a loss no deduction is to be made on that account from the cost of repairs. *Depeyster v. Columbian Ins. Co.*, 2 Caines (N. Y.), 85.

In calculating a loss on cargo, on an open policy, the goods are to be estimated at prime cost and charges, without deducting drawback. *Minturn v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 75. A vessel was captured and the court of prize ordered a restitution of the property, but on the captor's taking an appeal, it was agreed that the cargo should be delivered to the consignees at an appraisement, which was made at fifty per cent above the prime cost, and a bond was given for the amount, which was greater than the sum insured, and the cargo was afterwards sold for more than the appraised value; the court of last resort having reversed the decree below, and declared the vessel lawful prize, and the assured having been compelled to pay the amount of the bond, it was

held that the insurers were liable for the amount of the policy. *Gracie v. N. Y. Ins. Co.*, 8 Johns. (N. Y.) 237.

Where an insurance on a cargo was against the "dangers of the seas only," and the vessel was stranded and lost, but the cargo saved, and subsequently seized in port by the foreign government, whereby the master was prevented from forwarding it by another vessel, it was held that the seizure was the proximate cause of loss, and that the underwriters were not liable. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. (N. Y.) 21. Under a policy insuring against loss by thieves, the underwriters are liable for a taking by thieves in no way connected with the vessel, though the act be not perpetrated by open violence. *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.), 285.

Under a policy which provides that the insurers shall not be liable "for the bursting of boilers," they are exempt from any loss resulting therefrom. *Strong v. Sun Mut. Ins. Co.*, 31 N. Y. 103. Where the cargo is sold to defray the cost of repairs in a port of necessity, it is not a loss from the perils insured against for which the insurers are liable. *Ruckman v. Merchants', &c. Ins. Co.*, 5 Duer (N. Y.), 342. If goods are lost while in course of transportation from the shore to a vessel engaged in a trading voyage, the insurer is liable, if the means of transportation are according to the known course of trade and the established usage of the place. *Coggeshall v. Am. Ins. Co.*, 3 Wend. (N. Y.) 283; *Wadsworth v. Pacific Ins. Co.*, 4 id. 33.

The insurer of goods to a specified amount shipped on a trading voyage, on a time-policy, where the value of the whole cargo exceeds the sum subscribed, is liable for the full amount of his subscription, if after the landing a portion of the cargo in safety at the first port where the vessel stops to trade the residue is totally lost by one of the perils insured against; provided there are goods on board to the value of the sum subscribed; and in such case he cannot claim contribution from a subsequent insurer upon the same cargo, if the policy contain the American clause. *American Ins. Co. v. Griswold*, 14 Wend. (N. Y.) 399.

The general clause in a policy does not cover a loss resulting from the consumption of cargo by the crew or passengers, or from a sale to defray the expenses of necessary repairs. *Moses v. Sun Mut. Ins. Co.*, 1 Duer (N. Y.), 159. A policy exempted the underwriters from liability from loss by "leakage," unless occasioned by stranding or otherwise, and by a special clause indorsed thereon the insurance was expressed to be "on spirits of turpentine in cans packed in boxes on deck, free from loss by wet, breakage, leakage, or exposure," it was held that the insurers were exempted from liability for losses of which leakage should be the proximate cause, though the leakage itself might be occasioned by a peril insured against. *Neilson v. Commercial Mut. Ins. Co.*, 3 Duer (N. Y.), 455. The expenses necessarily and prudently incurred in respect to the salvage of the property after a shipwreck until transported to its ultimate

destination, and for transporting and supporting the master and crew, are to be borne by the insurers.

Where dollars taken by the master and crew from a stranded vessel, carried on shore, and buried in the sand, were stolen before they could be reclaimed, the loss must fall on the underwriters ; as also the services of the master and crew in transporting and saving the crew after they were disconnected with the vessel by shipwreck. *Bridge v. Niagara Ins. Co.*, 1 Hall (N. Y.), 423. The usual "suing and laboring" clause in a policy of insurance has reference to charges not covered by the insurance, and does not cover expenditures to repair losses caused by the risks insured against. No liability for a single loss can exceed the amount insured, and such further expenses as may fall under the "suing and laboring." *Alexandre v. Sun Mut. Ins. Co.*, 51 N. Y. 253. It is no defence to an action for a partial loss that the expense of the repairs was defrayed by a loan made on bottomry, and that the lenders, having insured their bottomry interest, had received the amount on a subsequent total loss of the ship. *Read v. Mut. Safety Ins. Co.*, 3 Sand. (U. S.) 54. In determining what is the loss of a canal-boat by ice, within an exception in the policy: the exception is not limited to the season of navigation. In *Allison v. Corn Exchange Ins. Co.*, 57 N. Y. 87, the defendant insured Elizabeth F. Lewis \$2,000 upon the "body, tackle, apparel, and other furniture of the boat called the 'A. Newcomb,'" of Oswego, from the 1st day of May, 1867, to the 1st day of May, 1868. The perils insured against were of the "inland lakes, rivers, canals, and fires." The excepted perils are described as follows: "For damage that may be done by the vessel insured to any other vessel or property; from ice, incompetency of the master, or insufficiency of the crew, or from want of ordinary care and skill in loading and stowing the cargo of said vessel; from rottenness, inherent defects, and other unseaworthiness; from theft, barratry, or robbery," &c. The policy gave permission to navigate the inland lakes, rivers, and canals of the State of New York, including the North and East rivers and harbor of New York, &c. Warranted "not to navigate between noon of the fifteenth day of December and noon of the first day of April following; during the last named time to be laid up tight and safely moored, satisfactorily to this company."

On the 26th October, 1867, the boat and appurtenances were sold and delivered by Elizabeth F. Lewis to the plaintiff, and the policy of insurance was at the same time assigned to him, by and with the consent in writing of the defendant. The boat arrived at Oswego on Saturday, the 5th day of December, 1867, and was laid up under the Oswego River bridge, at the lower end of the canal basin. She was made fast to two other boats by lines extending from her bow and stern, and also by an anchor-chain fastened to an iron ring in the sea-wall, — that is, the wall which separates the canal basin from the Oswego River. The boat was frozen in the ice that night, and remained so until the 13th March, 1868.

On the 13th March, 1868, the ice, which had broken loose in the river, accumulated in the channel above the bridge, and became so jammed as to partially dam the river. The water rose rapidly, and flowed over the sea-wall in such quantity as to cause a sudden rise of water in the basin. The boat was loosened from the ice around her stern and larboard side, but was held fast by the ice at her bow and starboard side forward. The water raised the stern, while the bow remained fast, and thus wrenched and twisted the boat, breaking her floor and top timbers, and causing other injuries.

The referee found as facts that the boat was not safely moored, that no notice whatever was given to the defendant, and that the damage was caused by ice; and he directed judgment for the defendant, which was entered accordingly.

REYNOLDS, J., said: "If it had not been for the ice the injury would not have happened, nor would it have occurred but for the presence of a large quantity of water in the Oswego River at the critical moment. The absence of either element, therefore, would probably have avoided the injury. We must, if it be possible, determine which, in the eye of the law, was the immediate and which the remote cause of the disaster. It is quite impossible to conceive of any disaster, marine or otherwise, which is not produced by the agency of several causes operating in a greater or less degree. Shipwrecks on the sea and conflagrations upon the land do not, ordinarily, result from a single cause, but generally from the combined influence of many unfriendly elements. An insurance against damage by fire subjects the underwriter to liability, if the insured property receives injury consequent upon fire from water, breakage, and various other incidents of such a misfortune. But for the fire the other incidents would have been inconsequential; and hence the fire, however occasioned, is the proximate cause; and if a high wind spreads the conflagration beyond all calculation, it is still the fire, and not the wind, in the judgment of the law, that produces the calamity, and makes the insurer responsible; and yet but for the unforeseen wind the fire itself would have been comparatively harmless. We must, if we can, give full effect to the contract of insurance made between the parties, and, in the effort to do that, we must at once discard the suggestion that the excepted injury from ice related only to those incident to the perils of navigation. The navigation of canal boats on the internal canals of this State we may safely assume is not usually attended with serious peril from ice; and when it is specially provided, as in this case, that the vessel was not to navigate between the 15th of December and the 1st of April following, and that during that period the vessel was to be "laid up tight and safely moored," we are bound to conclude that the exemption from injuries occasioned by ice were not those only happening when the vessel was actually engaged in navigation. If the vessel had been intended to visit the Arctic Ocean, it is possible that a different presumption might have

been indulged. We have no right to say that the exemption from liability caused by ice was intended to be limited to injuries happening while the boat was engaged in actual navigation. The language exempts the defendant from liability from *all* damage caused by ice.

“In a marine policy against the ‘perils of the sea,’ the underwriter assumes only extraordinary risks; and if a vessel goes down by the ordinary action of the wind and the waves, the insurer is not responsible, for the vessel is assumed to have been unseaworthy. In making the insurance, therefore, the fitness of the vessel for the intended voyage is to be considered. ‘A coasting schooner needs one kind of fitness, a freighting ship to Europe another, a whaling ship another, and a ship insured only while in port another:’ Parsons’s Merc. Law, 427, and cases cited; and, it may be added, a canal-boat intended for internal navigation quite another; and it is therefore well settled that, in construing such a contract, regard is to be had to the navigation intended and to the fitness of the vessel for the perils likely to be encountered.

“Under an insurance against the perils of the sea, it has been held that if a vessel reach a harbor in the course of its voyage, and is detained therein by stress of weather, or by being frozen in, or by any such cause, the damage does not fall upon the insurer. *Evertts v. Smith*, 2 M. & S. 278. But the insurer may specially contract for greater or less risk, according to the nature of the case, and where a canal-boat is insured with an exemption for damages caused by ice, it must be assumed that the exemption was intended to refer to injuries most likely to occur in such a case from such a cause; and it could not, therefore, very well refer solely to mere canal navigation or the other navigation permitted by the policy in controversy, within the period of time to which it was limited. We must, therefore, endeavor to find out the proximate cause of the injury in the present case, within the meaning of the law. What is or what is not the immediate cause of any disaster is a question of fact; and if the finding of the referee in this case as to the proximate cause of the injury is to be regarded as a pure question of fact, we have no alternative but to regard it as conclusive upon this branch of the case. But the finding ought not to be so regarded. It is rather more a finding of law upon certain facts established and stated in detail in his report, and is quite like an old-fashioned special verdict, and should be so considered in giving our judgment.

“The injury in this case was obviously occasioned by the combination of two causes operating at the same time, — one an undue quantity of water at the stern, and the other the tenacity of the ice at the bow of the vessel insured. It may be added that the excess of water at the time of the injury resulted largely, if not entirely, from an ice-dam in the river. If the ice-dam had not obstructed the flow of the water, the water would not have disturbed the stern of the boat; and even then, if the ice had not imprisoned the bow, the excess of water would not have twisted

the vessel to its injury. Giving, therefore, full effect to the maxim *causa proxima non remota spectatur*, as paraphrased by Lord BACON (Bac. Max. Reg. 1; Broom, Leg. Max. 215; Babcock v. Montgomery County Mut. Ins. Co., 4 N. Y., 326), — ‘It were infinite for the law to consider the cause of causes and their impulsion one on another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree,’ — we must conclude that the ice was the effect, and, in law, the proximate cause of the injury in the present case. It was the ice-dam that caused the waters of the Oswego River at just this time to flow in wild commotion, and when this was done, it was still the ice that held the bow of the vessel in its grasp until the injury happened for which damages are now sought to be recovered. As the defendant is exempted from liability for any damage caused by ice, the plaintiff cannot recover.

“This conclusion renders the consideration of any other questions in the case unimportant. The referee found that the boat had been safely moored by the insured, as required by the policy; and some questions of evidence relating exclusively to that proposition were raised upon the trial, but their determination either way would not alter our judgment.

“The order of the General Term should be reversed, and judgment absolute ordered in favor of the defendant.”

Where a vessel sailed from Washington, N. C., for New York, and was never afterwards heard of, it was held that after the lapse of a year the assured might recover for a total loss, without an abandonment. *Gordon v. Bourne*, 2 Johns. (N. Y.) 150. The master’s testimony that after stranding the vessel “was a complete wreck” does not *per se* establish an actual total loss. *McColl v. Sun Mut. Ins. Co.*, 2 J. & Sp. (N. Y.) 313. The necessary sale of a vessel in the course of a voyage to defray salvage amounts to a total loss. *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. If the sale of a perishable cargo becomes necessary in consequence of a peril of the sea, before arrival at the port of destination, it is a case of constructive total loss. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220. Where a vessel is sold by the master after a survey, without a regular condemnation, the assured cannot claim for a total loss. *Cort v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 375.

If a vessel is stranded, and afterwards, before abandonment, is gotten off without material injury, but in the mean time has been sold by the master at public auction, and purchased by himself, the assured is not entitled to recover for a total loss. *Church v. Marine Ins. Co.*, 1 Mas. (U. S.) 341. The entire loss of the voyage does not *per se* constitute a technical total loss of the cargo. The insurers do not undertake that it shall be lawful to trade at the port of destination, and if the voyage is abandoned from fear of forfeiture for illicit trade, this does not amount to a total loss of the cargo. *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176.

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Where a technical total loss is sought to be maintained on the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore on a cargo of mixed character no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch (U. S.), 39. The insurer of memorandum articles is liable only for a total loss, which can never happen where the cargo or a portion of it has been sent on by the assured, and reaches the original port of destination. *Moreau v. U. S. Ins. Co.*, 3 Wash. (U. S. C. C.) 256; *Humphreys v. Union Ins. Co.*, 3 Mas. (U. S.) 429; *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220. To constitute a total loss, the vessel must be injured to the amount of half her value, after deducting one-third new for old: *Smith v. Bell*, 2 Caines Cas. (N. Y.) 153; overruling *Dupuy v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 182. A report by surveyors in a port of distress that the repairs would cost \$20,000, and that the vessel was only worth \$10,000, and proof that upon such report and the request of the master, she was sold by order of a court of vice-admiralty, is sufficient evidence of a technical total loss. *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561.

The assured cannot recover for a total loss of the vessel which was not damaged to half her value, in consequence of an enforced sale of the cargo at a port of distress, and a consequent breaking up of the voyage. *Goold v. Shaw*, 1 Johns. Cas. (N. Y.) 293. Where 300 barrels of flour were insured from New York to London, 123 of which were jettisoned, and 23 were so damaged as to render necessary their sale at a port of distress, it was held that the insured might abandon for a total loss, though after deducting the proceeds of the damaged flour it did not amount to a moiety of the prime cost. *Moses v. Columbian Ins. Co.*, 6 Johns. (N. Y.) 219. Under a policy on a chariot "free from average," to be carried on deck, if the body of the chariot be thrown overboard in a storm, the insured is entitled, on abandoning, to recover for a total loss, though the remainder of the chariot be brought safely into port. *Judah v. Randal*, 2 Caines Cas. (N. Y.) 324. In case of a total loss of goods insured, the amount which the assured can recover is the prime cost and the charges thereon. *Leroy v. United Ins. Co.*, 7 Johns. (N. Y.) 343. And the plaintiff is entitled to recover the invoice price, without deduction for the drawback. *Gahn v. Broome*, 1 Johns. Cas. (N. Y.) 120. Where the underwriters are only liable for a total loss, if the vessel be forcibly taken possession of by the officers of the general government, and lost, the assured, after receiving a partial satisfaction from the government, cannot recover the residue from the underwriters; he should have abandoned for a total loss. *Murray v. Harmony F. & M. Ins. Co.*, 58 Barb. (N. Y.) 9.

If a supercargo, who is to receive a gross sum for his services, payable out of the proceeds of the return cargo, insure his interest, and the vessel be lost on her return voyage, he is entitled to recover for a total loss, having no claim against the owners. *Robinson v. N. Y. Ins. Co.*, 1 Johns. (N. Y.) 616.

An assured may abandon and recover for a total loss on profits, notwithstanding a prior abandonment to the underwriters on the cargo, who received the goods after their release by the captors and sold them to a profit. *Mumford v. Hallett*, 1 Johns. (N. Y.) 433. But to recover for an actual total loss, the assured must establish the physical extinction of the property insured, or the extinction of its value by the perils insured against. *Young v. Pacific Mut. Ins. Co.*, 2 J. & Sp. (N. Y.) 321. Where the goods saved do not amount to half the value of those insured, the assured may abandon for a total loss. *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141. Owners of merchandise insured against perils of the sea, "free of particular average only," are entitled to recover as for a total loss, though some portion of the goods are brought into port in specie, if the right to abandon is exercised during the continuance of the peril, and there is a total loss of value to the owner; total physical loss is not necessary. In *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, an action was brought against the defendants as insurers on cargo Sept. 25, 1863, by the plaintiffs, as the insured shippers thereof, for a total loss. It was a common cargo policy, except in being confined to *total* loss. It was expressed to be on vessels, &c., "*from ports in Europe to New York on merchandise free of particular average only.*" "Touching the perils which the company takes upon itself," it is declared in the policy that "they are of the seas, and all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said merchandise, or any part thereof."

The italicized words are in manuscript. The rest is part of the common printed form.

The defendants answered that the loss was not *total*.

The case was tried April 26, 1865. The plaintiffs had a verdict for \$22,383.86. And the judge directed that the defendant's exceptions be heard at the General Term, in the first instance. In the mean time judgment was suspended.

The plaintiffs, at Havre, France, shipped on board of the ship "*Mortimer Livingston*," bound for New York, 801 bags of coffee, worth \$27,427, and 64 bales of wool, worth \$3,961. During the voyage, and on Jan. 24, 1863, the vessel encountered a violent gale near Cape May, New Jersey. She was thereby wrecked, and totally lost off that place. She sunk in the sand, and remained imbedded therein. At full tide the water was over her main deck. Her cargo was submerged. This was seventy miles from New York.

The plaintiffs abandoned to the underwriters. The latter refused to

accept the abandonment. Due notice and proof of loss and of interest were given.

On advice of the disaster reaching New York, Boyd & Hincken of that city, agents for the shipowners, assuming, in the emergency, to act for the benefit of all whom it might concern, made a written agreement with a company of wreckers on Feb. 6, 1863. The wreckers were to save and deliver in New York as much of the cargo and materials as could be saved, and to receive sixty per cent of the net proceeds, to be ascertained either by auction sale or appraisement. Sixty-one bales of plaintiff's wool were accordingly brought to New York, delivered to Boyd & Hincken, and by them sold at public auction for \$1,100.02 over and above the auctioneer's charges. Some of the coffee, swollen with sea-water and discolored, was taken out by means of a dipper fixed to a hook at the end of a long pole. It was placed in 203 new bags, sent up to New York, and there sold in two lots at auction. It produced in all \$2.44 over the auctioneer's charges. There was evidence to show, and the jury found, that getting up the coffee grains and bagging and transporting them to New York was the act of the company itself, and a contrivance to convert a loss actually total into a loss constructively partial.

HUNT, J., said: "The recovery was for the value of the coffee only. The insurer of the wool and the coffee is liable for a total loss of either the wool or the coffee. Each is deemed the subject of a distinct insurance under the clauses in question. *Biays v. Chesapeake Ins. Co.*, 7 Cranch (U. S.), 418; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (U. S.) 40. There is but a single question in this case, Was there a total loss of the coffee ?

"The policy was a continuous one. It insured the merchandise from ports in Europe to New York '*free of particular average only.*' Under this clause, in the case of a single article, the insurers are liable only in the event of a total loss of the article insured. The shippers insist that the facts found establish a total loss of the coffee. The insurers insist that the loss is partial only. The question is, therefore, Was there a total loss of the coffee insured? More particularly still, the question may be thus stated: The ship is stranded, becomes a wreck, and is submerged in the sand; the tide at its full goes over her main deck, and her cargo is submerged. The master, in good faith, abandons the vessel and cargo as a total loss while in this condition, and in good time, and the owners give notice to the insurers. The latter refuse to accept the abandonment, employ a wrecking company, who, after some months of labor, recover from the vessel some wool and some coffee, the vessel and the body of the cargo never being saved.

"The wool, upon sale, produces \$1,100 more than the expenses of its recovery, and the coffee \$2.44 more than the expenses of its recovery.

"Is this a total loss of the coffee? Must there be a *total physical loss* of the subject of the insurance, or is a total loss to the owner sufficient ?

“In the English practice, a ship is a total loss when she has sustained such extensive damage that it would not be reasonably practicable to repair her. The ordinary measure of prudence which the courts have adopted is this: If the ship when repaired will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. *Moss v. Smith*, 9 M. & Gr. 103; *Irving v. Mantang*, 1 id. 176, 304; *Roselle v. Gurney*, 11 C. B. 186, 187; *Granger v. Martin*, 2 B. & S. 467, 468; *Adams v. McKenzie*, 13 C. B. n. s. 442.

“The American rule recognizes the same principle, but fixes upon a different amount of expense as giving the right to abandon. If the expenses of repair will exceed half the value of the ship when repaired, she is considered a total loss, according to the American authorities, and may be abandoned. See all the cases collected in 2 *Parsons on Marine Insurance*, edition of 1868, 125, 126.

“On the occurrence of a stranding like that in question, resulting in permanent-destruction, the voyage is lost by a peril insured against; and the master of the vessel thereupon becomes the agent of the cargo owners, as well as of the owners of the vessel, and must act as the facts of the case require. These facts and his abandonment create a total loss; and the subsequent recovery of the vessel or of a portion of the goods by extraordinary exertions, does not alter this result. This is salvage service merely, and does not create a general average, nor does it entitle the shipowners to freight. *Dunnett v. Tomaghen*, 3 Johns. (N. Y.) 156; *Heylzin v. Fireman's Ins. Co.*, 11 id. 85; *Bryan v. Maitland*, 25 Wend. (N. Y.) 618; 2 *Par.*, *ante*, 78, 79; *Story on Agency*, § 118.

“In cases like the present the chief question has been whether there must be an actual total physical loss of the thing insured, or whether there may be a constructive total loss, — whether there must be demolition and annihilation, or whether a destruction of all value to the owner, and hence a total loss to him, is sufficient. The current of authorities, both in this country and in England, as well as the conclusion of elementary writers, is in favor of the doctrine of constructive loss. The authorities are so distinct and so numerous that I will content myself with simply referring to them without comment. Especially is this the rule where the voyage is broken up by the destruction of the vessel. American authorities: *Lémont v. Lord*, 52 Maine, 393, &c.; *Poole v. Protect Ins. Co.*, 14 Conn. 47; *Bryan v. N. Y. Ins. Co.*, 25 Wend. 618; *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318; *Depeyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272. English cases: *Burnett v. Kenneyton*, 4 T. R. 210, 222; *Dyson v. Roncroft*, 3 Bos. & P. 474; *Cologan v. London, Ass. Co.*, 5 M. & S. 447; *Roux v. Salvador*, 3 Bing. N. C. 266; s. c. 4 Scott, 1; *Adams v. McKenzie*, 13 J. Scott C. B. n. s. 442; *Moss v. Smith*, 3 M. & Gr. 103; *Rosette v. Gurney*, 11 C. B. 186; *Granger v. Martin*, 2 B. & S. 467. Elementary authorities: 2 *Parsons on Marine Insurance*, 68, &c.; *Marshall*

on Insurance, 5th ed., 603, Shee's note; Phillips on Insurance, 5th ed., 437, n. 3; Park on Insurance, 6th ed., 151, 155; 2 Arnould on Insurance, * 1022.

"The same principles which prevail as to a total loss of the ship apply to the total loss of the cargo, with the difference which is made necessary by the difference in the nature of the property. 2 Pars., *ante*, 93.

"I will now refer more particularly to those cases on which the court below based its opinion in reaching a contrary result, as well as those cited by the counsel sustaining their judgment in the argument before us. The cases cited by the court below are those of *Magrath v. Church and Depeyster v. Sun Mut. Ins. Co.*, the last of which is cited by me to sustain the contrary doctrine. In addition to these cases, there are cited by the counsel for the respondents: *Mason v. U. S. Ins. Co.*, 1 Wheat. (U. S.) 219; *Skinner v. Western Ins. Co.*, 19 La. 273; 2 Pars. Mar. Law, 381; *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138; *Neilson v. Col. Ins. Co.*, 3 Caines, 108; *Long v. Gorman*, 1 Johns. Cas. (N. Y.) 226; *Cocking v. Fraser*, Doug. 295.

"The case of *Cocking v. Fraser* is discussed in all the elementary works, and in many of the reported cases. It is said that it never was an authority on the point in question. Park on Ins., 6th ed., 151, 155. It is hardly necessary to discuss that point. Conceding it to have been authority, it has been expressly overruled. Mr. Arnould says (2 Arnould Ins. 1022): 'It seems better to consider this case as overruled in English law than to endeavor to support it on its facts.' This case was decided by Lord MANSFIELD in 1784 or 1785. Lord KENYON dissented from this ruling in *Barnett v. Kennington*, 7 T. R. 210, 222, in 1797. Lord ALMESLEY overruled it in 1803, in *Dyson v. Roncroft*, 3 B. & P. 474, although he makes some effort to reconcile the cases. In 1816 Lord ELLENBOROUGH overruled it in *Cologan v. London Ass. Co.*, 5 M. & S. 447. In 1835 the case of *Roux v. Salvador*, in the Court of Exchequer Chamber, again overruled its principles. 3 Bing. N. C. 526; s. c. 4 Scott, 1. See 2 Pars. on Mar. Ins. 97, 98, &c.

"The first, in time, of the cases cited from the reports of this State, is that of *Leroy v. Gouverneur*, 1 Johns. Cas. (N. Y.) 226. That was on a policy 'free from average under seven per cent unless general,' upon a cargo of corn and stores, on a voyage from New York to Madeira. The vessel having met with foul weather put into Newcastle on the Delaware, but, being unable to obtain aid, proceeded thence to Philadelphia. The case states that 'on unloading her cargo all the corn was found to be so much damaged as to be unmerchantable and unfit to be reshipped; that a considerable quantity of the lumber had been thrown overboard during the storm.' In a *per curiam* opinion, it was held that the plaintiff could recover a proportion for the general average occasioned by the jettison, but not a total loss. It is to be observed that all the corn was there in

kind and specie. There was no destruction or change of character. It was not merchantable, simply; that is, it was not equal to the average of its class; not fit for sale at the market price of the uninjured article. It was 'not suitable to be reshipped;' that is, it was not corn of a character and quality suitable for shipment to Madeira. So again, as was said by Mr. Harper in *Moreau v. U. S. Ins. Co.*, 1 Wheat. (U. S.) 219, there never was an abandonment while the peril of total loss existed, and the right cannot be exercised after that peril is passed. The notice of abandonment must be given while the whole is in peril, and in a reasonable time. *Andrews v. Royal Ex. Ass. Co.*, 7 East, 38; *Davis v. Milford*, 15 East, 565.

"*Magrath v. Church* (1 Caines, 196) was the same case between different parties; and it appears in that report of the case that the actual value of the insured articles was \$924, in addition to all the expenses and charges connected with its preservation. The opinion was delivered by KENT, J. He held, as the court had before held, that the plaintiff could not recover as for a total loss. It is not to be denied that his observations in the course of his decision give countenance to the case of *Cocking v. Fraser*. They are, however, quite aside from the actual point of his decision upon the facts before him. This authority is subject to the remarks made upon the preceding case. *Neilson v. Columbian Ins. Co.*, 3 Caines (N. Y.), 108, was also an insurance upon corn from New York to Madeira. The jury found a verdict for a total loss, which the Supreme Court set aside. Without going further, it is sufficient to note the facts. 1. The voyage was not destroyed. 2. There was substantial value preserved (\$400). 3. The injury to the corn was from a peril not insured against. The statement in the case does not show that the vessel shipped any water. A portion of the corn was thrown overboard, and the vessel came to on the north side of the island, a southerly wind preventing her going to Funchal on the south side. Being alarmed by pirates, she stood away for the Cape de Verdes, and in nine or ten days reached Bonavista, 'when upon opening the hatches, the corn was found so damaged and offensive that it was forbidden to be landed, but was sold as it lay on board, for about \$400.' She then sailed for Brazos, reached St. Vincent, another of the Cape de Verdes, and after repair sailed to Lisbon. No claim against the underwriter was ever made on her. 4. The right to abandon was not exercised while the peril of total loss existed.

"In *Saltus v. Ocean Ins. Co.*, 14 Johns. (N. Y.) 138, the action was to recover for the loss of a cargo of corn shipped to Lisbon. It is to be observed of that case, that there was no loss of the voyage. 'The vessel was fully repaired, and in a state to proceed to sea, but did not prosecute this or any other voyage.' The cargo was materially injured, and was not in a state to be transported, but was yet of substantial value. No abandonment was claimed, while a peril of total loss remained. It is

conceded, however, that the principle of *Cocking v. Fraser* was supposed by the court to control the case.

“ The reference to *Parsons on Marine Law* is to a passage where a discussion is had of the cases already discussed by me.

“ *Moreau v. U. S. Ins. Co.*, 1 Wheat. (U. S.) 219, is also one of the cases cited by the respondent's counsel, and is apparently an authority in his behalf. The court decide in general terms that the loss cannot be said to be total if the property arrive at the port of discharge reduced in value or quality to any amount. The learned judge says: ‘ If the loss be total in reality, or such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage by capture, shipwreck, or otherwise, may be treated as a total loss.’ This, he says, is the doctrine of *Dyson v. Roncroft*, *ante*. The true point of the decision is found in the argument of Mr. Harper, of counsel for the insurance company. He says at p. 122: ‘ The right of abandonment exists while the peril of total loss exists, but when the article is saved from that peril the right no longer exists. The right of abandonment was not exercised in due time; not until after the peril had ceased.’ See 7 and 15 East. *ante*.

“ The case of *De Peyster v. The Sun Mut. Ins. Co.*, 19 N. Y. 272, has been cited by me as sustaining the right to recover in this case. It is also one of the cases relied upon by the defendant to sustain the judgment of the court below. The case was this: A cargo of hides on board a vessel sailing from the Spanish main to New York was insured free from average, unless general. The vessel sprung a leak, was obliged to throw overboard a portion of the hides; the rest were saturated with water, became putrid, and emitted a stench dangerous to health and life. Making Havana as a port of distress, the hides were found to be entirely damaged. Such of them as were not putrid were directed by the authorities to be sold, the residue were thrown into the sea. Some of the damaged hides were purchased by an American shipper, who sent them to Boston, where they arrived damaged and worn, and were sold at a loss of forty-five per cent. The defendant asked the judge to charge that the plaintiff could not recover for a total loss, because a portion of the property remained in specie, and was of some value after the disaster, and after the arrival in Havana. This was refused. The plaintiff recovered, and the Court of Appeals (in 19 N. Y. *ante*) sustained the verdict.

“ In the case before us, the stranding of the vessel was, within all the authorities, of such a character as to create a total loss. She was ashore on the most perilous part of the Atlantic coast, in the depth of winter, her main deck submerged, and was incapable of restoration. 2 Pars. Mar. Ins. *ante*. While thus exposed to the peril of a total loss, the master abandons the vessel, and notice is given to the underwriter. The under-

writer employs a wrecker at a great expense to visit the vessel, who, after a labor of some months, is able to recover a small portion of the cargo, among the rest some bales of the wool and portions of the coffee, so damaged as to be worthless. The jury have found that this effort to recover the cargo was a contrivance simply to convert into a partial, what would otherwise be a total loss. In my view of the case, the loss of the coffee was total, and the right to recover became fixed when the abandonment was made. The rescue of a portion of the contents of the vessel, with whatever motive it was done, did not undo what was already done. It could not convert into a partial loss that which, under the circumstances detailed, the law adjudged to be total. It need not be denied that many of the New York cases give countenance to the doctrine contended for by the respondent. I have endeavored to show that they may be sustained without sustaining that doctrine. The rule, as established by the recent English cases and the cases in Maine and Connecticut, and as laid down by the elementary authors cited, is, in my judgment, the true rule, and should be so declared by this court."

Where a vessel puts into a port of necessity, and is repaired, and afterwards is totally lost, the insured is entitled to recover for the partial loss arising from the repairs and general average consequent thereon, in addition to the total loss. *Saltus v. Com. Ins. Co.*, 10 Johns. (N. Y.) 487.

In estimating a loss in case of repairs, the insured are entitled to a deduction of one-third new for old, without regard to the age of the vessel. *Dunham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 315; *Byrnes v. National Ins. Co.*, 1 Cow. (N. Y.) 265. The rule is to apply the value of the old materials towards payment for the new, and to allow the deduction of one-third new for old upon the balance. *Byrnes v. National Ins. Co.*, 1 Cow. (N. Y.) 265. If the defects in a vessel existing previously to effecting a policy of insurance are not such as to render her unseaworthy, they cannot be taken into consideration in determining whether the expense of her repairs exceeds half her value. *Depau v. Ocean Ins. Co.*, 5 Cow. (N. Y.) 63. The assured's portion of a cargo of cotton was insured by a valued policy; part of the cargo was lost by perils of the sea, and the residue was brought to the port of destination, but incapable of being identified: it was held that the loss was a partial, not a total one, with benefit of salvage. *Sale v. Sun Mut. Ins. Co.*, 3 Robt. (N. Y.) 602.

The destruction of part of a cargo consisting of the same kind of articles (as hides) is a partial loss only, not a total loss of such part. *Biays v. Chesapeake Ins. Co.*, 7 Cranch (U. S.), 415; *Humphreys v. Union Ins. Co.*; 3 Mas. (U. S.) 429. A partial loss of an entire cargo by sea damage, if amounting to more than fifty per cent, may under circumstances be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage is thereby not broken up. *Seton v. Delaware Ins. Co.*, 2 Wash. (U. S. C. C.) 175. In a case of collision, though the

loss to the ship itself is less than five per cent, yet if the sum apportioned to her on account of the injury to the other vessel, together with her own loss, exceed five per cent, the underwriters are liable, notwithstanding a clause that they shall not be responsible for a loss under that amount. *Peters v. Warren Ins. Co.*, 1 Story (U. S.), 463.

Where a voyage has been broken up, the underwriters are not entitled to an allowance for freight earned on the return voyage. *Simonds v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 443. But where a vessel is repaired in a foreign port, the underwriters are entitled to a deduction of one-third new for old. The actual cost of the repairs at its true value, and not the cost estimated in a depreciated currency, is the rule by which the loss is to be ascertained. *Humphreys v. Union Ins. Co.*, 3 Mas. (U. S.) 429. In ascertaining whether the loss amount to five per cent, there must be a deduction of one-third new for old on the amount of the repairs. *Saunderson v. Columbian Ins. Co.*, 2 Cranch (U. S. C. C.), 218. In adjusting a loss on a cargo on a voyage from a port in the United States to several ports in the West Indies and back home, the value of the cargo is to be ascertained at the port from which the vessel last sailed before the loss; and if freight have been there earned, and not paid, and be not chargeable upon the salvage, it is to be added to the value of the original cargo. *Catlett v. Columbian Ins. Co.*, 3 Cranch (U. S. C. C.), 192. The capture of a neutral vessel as prize by a belligerent cruiser is a total loss, and entitles the assured to abandon. *Rhineland v. Ins. Co. of Pennsylvania*, 4 Cranch (U. S.), 29. So the capture and carriage into a belligerent port, though the cargo is not condemned, amounts to a total loss, if the vessel is not permitted to sail with it unless security is given not to carry it to certain ports, and it is thereupon sold by the supercargo. *Hurtin v. Phenix Ins. Co.*, 1 Wash. (U. S. C. C.) 400. After capture he acts for whom it may concern; and if he abandons, he thereupon becomes the agent of the underwriters. *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.), 268.

A vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against the "arrests, restraints, and detainments of kings," &c., for which the insurers are liable. *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 183. If the vessel is prevented by a blockading squadron from entering any of the enumerated ports, the voyage is broken up, and the assured may abandon, and recover for a total loss. *Simonds v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 382. The master of a vessel is not bound to depart from an island under a threat of seizure by a government whose jurisdiction over it is not acknowledged by the United States; and a loss incurred by such seizure falls on the underwriters. *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. If a vessel is prevented from proceeding on her voyage by reason of a subsequent embargo, the insured may aban-

don and recover for a total loss. *Odlin v. Ins. Co. of Pennsylvania*, 2 Wash. (U. S. C. C.) 312. In case of capture, if before the vessel is delivered from that peril she is lost by fire, or accident, or negligence of the captors, the whole loss is attributable to the capture. *Magoun v. N. E. Marine Ins. Co.*, 1 Story (U. S.), 157. If the assured does any act which increases the risk of capture and detention, according to the common practice of the belligerent, it may avoid the policy. *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 506. Proof that possession was taken of a vessel by a privateer, and was carried into a hostile port, is sufficient evidence of a total loss, after three years, without showing a condemnation. *Ruan v. Gardner*, 1 Wash. (U. S. C. C.) 145. But a warning and indorsement of papers by a hostile cruiser does not amount to "an arrest, restraint, or detention" that will justify a breaking up of a voyage, if there was no actual blockade. *King v. Delaware Ins. Co.*, 6 Cranch (U. S.), 71. A recapture does not necessarily prevent a loss from being total; it depends on the particular circumstances of the case. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.), 357.

NOTE 37. Perils of the Sea. — The insurer does not attempt to insure against the ordinary perils to which every ship is exposed in the usual course of her voyage, but only against extraordinary and unforeseen perils of the sea. *Barnewall v. Church*, 1 Caines (N. Y.), 217; *Coles v. Ins. Co.*, 3 Wash. (U. S. C. C.) 159.

Perils by capture: *Moore v. Perpetual Ins. Co.*, 16 Mo. 98; by stranding, if its consequences are extraordinary: *Sage v. Middletown Ins. Co.*, 1 Conn. 239, are perils of the sea; but losses resulting from the mere age or wear and tear of the subject, without the intervention of an extraordinary peril, are not. If however the loss happened in consequence of the violence of the winds, running on to rocks, sunken wrecks, &c., the insurer is liable, because these are perils of the sea. *Coles v. Ins. Co.*, 3 Wash. (U. S.) 159. As to what are perils of the sea, see *Potter v. Ins. Co.*, 2 Sumn. (U. S.) 197; *Fleming v. Marine Ins. Co.*, 4 Whart. (Penn.) 59; *Washington Mut. Ins. Co. v. Reed*, 20 Ohio, 199; *Patrick v. Hallett*, 1 Johns. (N. Y.) 241. See **NOTE 36**.

NOTE 38. Jettison is the throwing overboard of a portion of the cargo, or cutting away of masts, spars, rigging, &c., for the purpose of lightening the ship, and for the general safety of the vessel or crew; and this must be done by order of the master or other person in command of the vessel, and cannot be done by the men. *Sims v. Gurney*, 4 Binn. (Penn.) 513. And contribution can be claimed therefor. *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Johnson v. Crane*, 1 Kerr (N. B.), 356; *Lenox v. United States Ins. Co.*, 3 Johns. Cas. (N. Y.) 178; *Smith v. Wright*, 1 Caines (N. Y.), 43; *Cram v. Aiken*, 13 Me. 229; *Toledo Ins. Co. v. Speares*, 16 Ind. 2; *Lenox v. United States*

Ins. Co., 3 Johns. Cas. (N. Y.) 178; *Maggrath v. Church*, 1 Caines (N. Y.), 196; *Lewis v. Williams*, 1 Hall (N. Y.), 430; *Whitteridge v. Norris*, 6 Mass. 125; *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *Shiff v. Louisiana State Ins. Co.*, 6 Martin (La.), 629; *Brooks v. Oriental Ins. Co.*, 7 Pick. (Mass.) 259; *Giles v. Eagle Ins. Co.*, 2 Met. (Mass.) 140; *Meech v. Robinson*, 4 Whart. (Penn.) 360.

NOTE 39. **Loss by Capture and Seizure** is covered by a policy in common form, and applies to a seizure made by public enemies, belligerents, or by the government. *Rhineland v. Ins. Co.*, 4 Cranch (U. S.), 29; *Dale v. Merchants' Ins. Co.*, 51 Me. 465; *Dale v. N. E. Ins. Co.*, 6 Allen (Mass.), 373; *Odlin v. Ins. Co.*, 2 Wash. (U. S. C. C.) 312; *Lorent v. S. C. Ins. Co.*, 1 N. & McCord (S. C.), 505, *M'Bride v. Marine Ins. Co.*, 5 Johns. (N. Y.) 299; *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176; *Richardson v. Ins. Co.*, 6 Mass. 102; *Scott v. Libby*, 2 Johns. (N. Y.) 336; *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 253.

The capture of a vessel is a constructive total loss of it, so long as it remains in the possession of the captors, and if she is restored without her papers, so as not to be in a legal capacity to prosecute her voyage, she may be abandoned for a total loss. *Post v. Phenix Ins. Co.*, 10 Johns. (N. Y.) 79.

When the same person is owner of ship, freight, and cargo, and the vessel only is insured, the underwriter in case of a loss by capture is only responsible for a proportion of the expenses incurred in laboring for the recovery of the property, which are to be averaged on the ship, freight, and cargo, they having been insured for the joint benefit of the several owners thereof. *James v. Marine Ins. Co.*, 7 Johns. (N. Y.) 412. Acts of the master done in good faith and for the benefit of all concerned, are equally available as to his interests as a part-owner as for other parties in interest. *Waddell v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 79.

Where a vessel is warranted free from British capture and detention, there can be no recovery, if she was obliged to return to port and the voyage was broken up in consequence of a warning from a British blockading squadron. *Wilson v. United Insurance Co.*, 14 Johns. (N. Y.) 227. So where a vessel was warranted free from loss by the British, but in case of capture, the usual sea-risks to continue, and she was captured, and, whilst detained, lost by the negligence of the captors, it was held that the insurer was not liable. *Coolidge v. N. Y. Firemen Ins. Co.*, 14 Johns. (N. Y.) 308. Where a policy contained the clause, "the insurers take no risk of a blockaded port," it was held to extend to every loss happening by reason of a blockaded port, whether such blockade was a strictly legal one or not. *Radcliff v. United Insurance Co.*, 7 Johns. (N. Y.) 38. If a ship is captured and acquitted, the underwriter is liable for the expenses of prosecuting an appeal against

a sentence condemning the assured in costs, and for damages by plundering and embezzling, although the expenses exceed the underwriters' subscription. *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276. So where goods insured were captured, and the vessel was released, but the goods detained for further proof, and afterwards restored, on payment of full freight; but the owner was obliged to hire another vessel to carry them to their destination; the insurers were held liable for the additional freight. *Mumford v. Commercial Ins. Co.*, 5 Johns. (N. Y.) 262. Generally in case of a loss by capture, the assured is entitled to recover, above the sum insured, all necessary expenses of labor and trouble for the defence and recovery of the property insured; and where such expenses are incurred for the recovery of the ship, the assured may recover the whole amount against the underwriter on the vessel, although the freight and cargo are incidentally benefited. *Watson v. Marine Ins. Co.*, 7 Johns. (N. Y.) 57; *Francis v. Ocean Ins. Co.*, 2 Wend. (N. Y.) 64.

NOTE 40. **Barratry.** — See NOTE 35, *ante*.

NOTE 41. See NOTE 26, *ante*.

NOTE 42. See NOTE 36, *ante*.

NOTE 43. See NOTE 35, *ante*.

NOTE 44. As to when a vessel may be said to be moored in safety, see *Zacharie v. Orleans Ins. Co.*, 5 Martin (La.), 637; *N. Y. Firemen's Ins. Co. v. Lawrence*, 14 Johns. (N. Y.) 46; *Dickey v. United Ins. Co.*, 11 id. 358; *Shapley v. Tappan*, 9 Mass. 20; *Ellery v. N. E. Marine Ins. Co.*, 8 Pick. (Mass.) 14; *Upton v. Salem Commercial Ins. Co.*, 8 Met. (Mass.) 605; *Stacker v. Harris*, 3 Mass. 409; *Bill v. Mason*, 6 Mass. 313.

NOTE 45. See NOTE 35, *ante*.

NOTE 46. See NOTE 36, *ante*.

NOTE 47. See NOTE 38, *ante*.

NOTE 48. See NOTE 39, *ante*.

NOTE 49. **Deviation, what is, Effect of.** — In all policies of marine insurance, in addition to seaworthiness, there is an implied warranty that the vessel shall not deviate, and that the assured will use reasonable diligence to guard against the risks covered by the policy; and a breach of either of these implied warranties is fatal to the policy. A deviation

consists in a variation of the risks insured against, without necessity or reasonable cause; and if the risks are varied, the underwriter is discharged though they are apparently diminished. The underwriter has a right to make his own terms, and the assured is not at liberty to question their wisdom. Therefore it is a matter of no importance whether a deviation lessens or increases the risk. If there has been an unjustifiable deviation, the policy is avoided from that time. *Child v. Sun Mut. Ins. Co.*, 3 Sand. (N. Y.) 26. But the making of a port of necessity, though out of the vessel's direct course, *if done in good faith and to avoid threatened danger*, is no deviation. *Graham v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 352. Nor if the master of a vessel in good faith enters a port not mentioned in the policy and somewhat out of the usual course of the voyage, in order to obtain the protection of convoy, and with a sole view to avoid danger of capture, is it a deviation. *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10; *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79. So if a vessel insured against "sea risk only," after experiencing heavy gales, springs a leak on her voyage, and when within seventy miles of her port of destination is turned back by a blockading squadron, whereupon she is obliged to put into a port of necessity, where she is found not worth repairing, the deviation is excused by necessity, and the insurers are liable for the loss. *Robinson v. Marine Ins. Co.*, 2 Johns. (N. Y.) 89; *Suydam v. Marine Ins. Co.*, 2 id. 138.

A deviation to avoid an enemy's cruisers: *Goyon v. Pleasants*, 3 Wash. (U. S.) 241; or to repair, when repairs cannot be made at the port of departure: *Cruder v. Phila. Ins. Co.*, 2 Wash. (U. S.) 262; or to procure water or provisions, where the lack of them is not a result of the fault of the assured: *Turner v. Protection Ins. Co.*, 25 Me. 515, does not avoid the policy.

Nor is it a deviation for the vessel to stop to aid another in distress. *Walsh v. Homer*, 10 Mo. 6. Or to save lives which are in jeopardy. *The Boston*, 1 Sumn. (U. S.) 328. Nor if a vessel is driven into a port of necessity, and a pestilence breaks out that prevents her from resuming her voyage, are the insurers discharged from liability. *Williams v. Smith*, 2 Caines (N. Y.), 1.

In *Kane v. Ins. Co.*, 2 id. 264, where a vessel and cargo were insured from New York to Antigua, and from thence to Curaçoa; and on her voyage to Antigua was driven by necessity to St. Croix, where part of the cargo, being perishable and damaged, was sold; and the master deeming it impracticable to beat up to Antigua sailed direct to Curaçoa, and she was captured on her passage and condemned; it was held that this was no deviation, and that the sale of part of the cargo at St. Croix did not avoid the policy. And in a later case, where a vessel was insured "at and from Santa Martha on the Main to New York," with liberty of touching at two other ports; and by a subsequent agreement,

liberty was given to use "three additional ports on the voyage from the Spanish Main to New York;" it was held to be no deviation to visit three additional ports on the Main. *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272. On June 13, 1879, the defendant insured a steam tug, then lying at St. Georges in the Bermudas, "at and from Bermuda to New York," to sail during July. On July 2 she left her berth and steamed to Hamilton, about twenty miles, where she took a schooner in tow, brought it to St. Georges, and from there towed it out to sea about five miles, and then returned to her berth. On July 3, after receiving her clearance papers, she towed another schooner to sea, then proceeded to Hamilton and took on coal and a life-boat; sailed from there July 4 for New York, and was lost *en route*. It was held that the towing trips were such deviations as forfeited the insurance. *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196.

So where a vessel bound for a certain port meets with bad weather, and on her arrival off the port of her destination is prevented by adverse winds from entering the port, whereupon the master suspecting a vessel in sight to be a privateer bears away, and falling into the trade winds goes to another port, this is held to be a deviation not warranted by necessity, which avoids the policy. *Neilson v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 301. But the doctrine of this case is questionable, and not in accordance with the principles of natural justice upon which this class of contracts are predicated. If the master had reasonable grounds for suspecting that the vessel was a privateer and that she was in jeopardy of capture, it was his duty to seek to avoid the danger even though it took his vessel out of the route contemplated. So where a vessel insured from New York to Bordeaux, with liberty if turned away to proceed to another "near open port," when within twenty leagues of the Isle of Oleron was boarded by a British cruiser, warned not to enter any port under French influence, and informed she must either proceed to England or Malta, or return to America, whereupon the master shaped his course for England, but being driven by stress of weather into L'Orient was seized by the French government; it was held that the attempt to reach an English port was a deviation which discharged the underwriters. *Tenet v. Phoenix Ins. Co.*, 7 Johns. (N. Y.) 363; *Corp v. United Ins. Co.*, 8 id. 277. Where a vessel, which was insured at and from Port Plata, instead of entering that port went to Susua, which is in the same revenue district but at a distance of eighteen miles from the port called Port Plata, was lost, this was held to be a deviation which discharged the underwriters; Port Plata being a safe harbor and Susua an open, and at times a dangerous roadstead. *Vos v. Robinson*, 9 Johns. (N. Y.) 192. In *Stevens v. Commercial, &c. Ins. Co.*, 26 N. Y. 397, a policy contained a warranty against using ports in the Gulf of Mexico; the underwriters, for a consideration, gave permission to use Laguna for one voyage; it was held to be a deviation for the vessel, after touching at Laguna, to go

to another port on the Gulf, though for the purpose of entry at Laguna the commercial regulations of Mexico made it necessary to enter and pay tonnage duties at some other port. *Quære*. Is this sound doctrine? Should not the insurers be presumed to understand the commercial usages and regulations of countries and ports to which they insure, and to make their contracts in reference and subject thereto? See also *Crosby v. Fitch*, 12 Conn. 410.

In *Schroeder v. Schweizer, Lloyd, & Gesellschaft*, 66 Cal. 294, wheat was insured from San Francisco to Hong Kong. The wheat was transshipped at Yokohama, and it was held that this was a deviation which avoided the policy, and that the fact that the bill of lading authorized such transshipment was immaterial, as the company had not contracted in reference to it. The reason for this is, that in all contracts of marine insurance on freight there is an implied condition that the ship shall not be changed without necessity or consent, as such change is essentially a change of risk which discharges the insurers from liability. Mr. Arnould, in his excellent treatise on Insurance, Vol. I., p. 178, says: "If either before the commencement of the voyage or during the course of it, the ship named in the policy be changed without necessity, or without the consent of the underwriters, they will be discharged from liability." And this rule is so invariable that the assured will not be permitted to show that the ship employed was larger, stancher, and much more suitable for the voyage than the one named in the policy. The insurer having accepted the risk for a particular ship, he has a right to say that he had some peculiar reasons for insuring a risk on that very ship which should not apply to any other. But if the vessel becomes disabled by stress of weather, so as to be incapable of by any means at the master's disposal of being repaired at all, so as to take on the cargo, the master may employ another ship to take the cargo to its port of destination, and the insurer will still be liable for its safe arrival; and, of course, the same rule applies where the insurer consents to a substitution of ships. *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107; *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. (N. Y.) 21; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270. So it is a deviation to proceed to another port to avoid performing quarantine at the port of destination. *Robertson v. Columbian Ins. Co.*, 8 Johns. (N. Y.) 491. And generally if a vessel insured by a time policy voluntarily sails to and enters a prohibited port, the policy is absolutely avoided, and is not revived by her return in safety therefrom; if she is lost, after such deviation, there can be no recovery against the underwriters. *Day v. Orient Mut. Ins. Co.*, 1 Daly (N. Y. C. P.), 13.

A delay in port does not necessarily amount to a deviation if there are circumstances sufficient to justify it; and if justifiable, the taking in of a cargo will not render it a deviation. Nor is it a deviation for the vessel to remain in port for six months after the date of the policy, there being

no fraud nor variation of the risk. *Earle v. Shaw*, 1 Johns. Cas. (N. Y.) 313; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241. In *Gilfert v. Hallett*, 2 Johns. Cas. (N. Y.) 296, a stay on a trading voyage of upwards of four months in one port was held not to amount to a deviation. The voyage, and the incidents usual to such voyages, enter largely into the consideration of the contract, and an insurance upon a vessel for a single premium at and from the port where she is lying at anchor, to another, being a continuous and indivisible risk, a voluntary and unnecessary departure from port, except upon the voyage insured, avoids the policy, and discharges the underwriter from all liability. *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571.

In case of an intended deviation, if the ship is captured before reaching the diverging point, the insurers are liable, because the voyage had not been departed from. *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 241; *New York Firemen Ins. Co. v. Lawrence*, 14 id. 46. And for the same reason, and under the same rule, a warranty not to use a certain port is not broken by sailing towards such port with intent to enter it, if the vessel is lost before her arrival, not being then in forbidden waters. *Snow v. Columbian Ins. Co.*, 48 N. Y. 624; *Wheeler v. New York Mut. Ins. Co.*, 3 J. & Sp. (N. Y.) 247.

The smallest deviation from the usual course of the voyage without a justifiable necessity discharges the underwriters, though the loss was not the immediate consequence of the deviation: *Martin v. Delaware Ins. Co.*, 2 Wash. (U. S. C. C.) 254; *Glidden v. Ins. Co.*, 1 Sumn. (U. S.) 232; and a detention at sea to save a vessel in distress is such a deviation as discharges the underwriters. *Mason v. The Blaireau*, 2 Cranch (U. S.), 240; *The Boston*, 1 Sumn. (U. S.) 328; *The Henry Ewbank*, id. 401; *Warder v. La Belle Creole*, 1 Pet. Ad. (U. S.) 340; *Crocker v. Jackson*, 1 Spr. (U. S.) 141. But a stoppage to save the crew of a wrecked and sinking vessel, whose lives are in jeopardy, is not a deviation; but, as before stated, the rule is otherwise of a delay to save property. *The Boston*, 1 Sumn. (U. S.) 328; *The Henry Ewbank*, id. 401; *Bond v. The Cora*, 2 Wash. (U. S. C. C.) 80; *Crocker v. Jackson*, 1 Spr. (U. S.) 141; *The George Nicholas*, Newb. (U. S.) 449. *But if the master is influenced by the double motive of relieving distress and saving property*, it is no deviation, and in doubtful circumstances the court will give his motive a favorable construction. *Crocker v. Jackson*, 1 Spr. (U. S.) 141. Nor is it a deviation for a ship to go out of her course three miles to speak another, on a signal for that purpose, nor to delay three hours to take from a foreign vessel shipwrecked American seamen. *Box of Bullion*, 1 Spr. (U. S.) 57; *Crocker v. Jackson*, id. 141. A departure to learn whether a port, not of destination, be blockaded is a deviation. *Maryland Ins. Co. v. Woods*, 6 Cranch (U. S.), 29. It is not a deviation in time of war to stop at a customary port with the honest intention of avoiding hostile cruisers, if the vessel remains there no longer than is necessary. *Goyou v.*

Pleasants, 3 Wash. (U. S. C. C.) 241. If the bar on which a vessel is stranded is out of the due course of the voyage insured, and the deviation was voluntary, or produced by want of skill or care by the master, the insurers are discharged. *Howland v. Marine Ins. Co.*, 2 Cranch (U. S. C. C.), 474; *Winthrop v. Union Ins. Co.*, 2 Wash. (U. S. C. C.) 7; *Coles v. Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159.

If an accident happens while the property is at the risk of the underwriters, and cannot be repaired at the port of departure, the vessel may go to the nearest port for that purpose without being guilty of a deviation. *Cruder v. Philadelphia Ins. Co.*, 2 Wash. (U. S. C. C.) 262. But if a vessel is unseaworthy at the time when the voyage commences, for want of a proper complement of men, this will not excuse a deviation to supply the deficiency at another port. *Cruder v. Pennsylvania Ins. Co.*, 2 Wash. (U. S. C. C.) 339. Want of water, a sufficiency for the voyage having been taken on board at the port of departure, will justify a deviation. *Wood v. Pleasants*, 3 Wash. (U. S. C. C.) 201. Delay in accomplishing the objects of the voyage by selling the cargo reasonably and according to the known course of trade, is not a deviation. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383. Nor if it is the custom and usage of a particular voyage to touch and stay at a certain port, if the master does so is it such a deviation as will discharge the insurer. *Bentaloe v. Pratt*, Wall. (U. S. C. C.) 58.

Unnecessary delay in port to take in cargo is a deviation which discharges the underwriters; but what delay is necessary depends upon the circumstances of the case, and not on the usage of the port, though the latter may be evidence of the necessity. The danger of capture which will justify a long delay must be obvious and immediate with reference to the situation of the vessel. If the vessel remains at the port of destination long enough to take in a cargo, and then sails without cargo to another port where it is usual to touch, and there remains and takes a cargo, this is a deviation; unless the delay was in conformity with a usage to wait at the first port to have a cargo collected at the other. *Oliver v. Maryland Ins. Co.*, 7 Cranch (U. S.), 487. Where liberty was given to touch at Matanzas to obtain information whether men-of-war were off Havana, a discharge of the cargo at Matanzas by order of the local government, which occasioned no delay and no increase of risk, was held not to amount to a deviation. *Hughes v. Union Ins. Co.*, 3 Wheat. (U. S.) 159. Under a policy on vessel and freight "at and from Teneriffe to Havana, and at and from thence to New York, with liberty to stop at Matanzas," it is not a deviation to unlade at Matanzas, if then necessarily waiting in that port to avoid cruisers, and the unlading occasions no delay. Under such policy, it is no deviation to take a cargo at Havana for New York, though the vessel sailed from Teneriffe under a charter-party which secured a gross sum for the hire of the vessel for the whole voyage, and with a cargo which was to be landed at Havana,

this charter-party not being represented to the underwriters. *Hughes v. Ins. Co.*, 8 Wheat. (U. S.) 294.

If a vessel, with liberty by the terms of her policy to "touch" at a particular port "for stock and to take in water," ships a cargo at such port, the delay for that purpose is a deviation, though the risk is not thereby increased. *Maryland Ins. Co. v. Le Roy*, 7 Cranch (U. S.), 26; *United States v. The Paul Shearman, Pet.* (U. S. C. C.) 98. In a voyage to P., the vessel, when she arrived off that port, came to anchor in the outer roadstead, when she might have gone directly in, and was there lost; this was held such a deviation as discharged the underwriters. *West v. Columbian Ins. Co.*, 5 Cranch (U. S. C. C.), 309. If the policy describes the voyage as from Ocrocoke to St. Bartholomew or St. Thomas, and at or from thence to Tobasco, it is a deviation after stopping at St. Bartholomew to proceed to St. Thomas; the policy does not authorize the assured to go to both ports, unless a uniform usage to do so is shown, which is impliedly made a part of the contract. *Bulkley v. Protection Ins. Co.*, 2 Paine (U. S.), 82. In river navigation a vessel is not confined to the usual route. *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311.

An intention to deviate does not amount to a deviation, nor is there a deviation until something is voluntarily done which actually changes the risk from that contemplated by the parties. The vessel has not deviated until it has gone out of the usual track or course intentionally or unnecessarily; and if it is lost within the usual track of the voyage, although while headed for a port outside, the insurer is liable. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.), 357; *Winter v. Del. Ins. Co.*, 30 Penn. St. 334; *McFee v. S. C. Ins. Co.*, 2 McCord (S. C.), 503. If a vessel sails to a port within the policy, with the intention of going to a port not within it in case the former should be blockaded, this is not a deviation. *Maryland Ins. Co. v. Wood*, 6 Cranch (U. S.), 27; *McFee v. S. C. Ins. Co.*, 2 McCord (S. C.), 503; *Lee v. Gray*, 7 Mass. 849; *Thompson v. Barker*, 1 Root (Conn.), 64; *Hobart v. Norton*, 8 Pick. (Mass.) 157; *Fitzsimmons v. Newport Ins. Co.*, 3 Cranch (U. S.), 357. But when the vessel is once outside the line of the voyage, intentionally or unnecessarily, the insurer is discharged, — at least, until the regular voyage is resumed.

In *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196, it appeared that on June 13, 1879, defendant insured a steam tug then lying at St. Georges, in the Bermudas, "at and from Bermuda to New York," to sail during July. On July 2 she left her berth and steamed to Hamilton, about twenty miles, where she took a schooner in tow, brought it to St. Georges, and from there towed it out to sea about five miles, and then returned to her berth. On July 3, after receiving her clearance papers, she towed another schooner to sea, then proceeded to Hamilton and took on coal and a life-boat, sailed from there July 4, for New York, and was lost

en route. It was held the towing trips were such deviations as forfeited the insurance.

RUGER, C. J., said: " On June 13, 1879, the defendant executed and delivered a marine policy of insurance, for account of whom it might concern, upon the steam tug 'C. F. Ackermann,' belonging to the plaintiff's testator, 'lost or not lost, at and from Bermuda to New York,' to sail during the month of July. The policy also contained the following clause: 'Beginning the adventure upon the said vessel, tackle, apparel, &c., at and from as aforesaid, and so shall continue and endure until the said vessel be safely arrived at as aforesaid, &c., and until she lie moored twenty and four hours in good safety. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance.' At the time of the insurance the tug was lying at St. Georges, in the Bermudas, and sailing thence on July 4, became water-logged, in consequence of a leak, the location of which was undiscovered, and sank in the open sea about nine o'clock P.M. of the next day. She was then about seventy miles from the island, and was upon her voyage to New York. The captain and crew escaped in the life-boat attached to the tug, and returned in safety to the island.

" Several defences to this action, brought by the owners upon the policy, were pleaded, and among them were the alleged unseaworthiness of the tug, collusion by the plaintiff's testator in causing the loss in question, and a deviation from her course by the tug after the voyage policy had attached.

" We are of opinion that the questions arising upon the first two grounds stated were properly disposed of at the trial by leaving them to the jury upon the evidence as questions of fact, and that the conclusions arrived at by them are not subject to review here.

" The serious question in the case arises upon the defence of deviation. The terms used in the policy by which the tug was insured, 'lost or not lost at and from Bermuda,' would, in the absence of any qualifying language, indicate an intention to have the insurance attach immediately upon the subject thereof at the place of its location. Phillips on Insurance, §§ 925, 932, 933. No provision is made in the policy for the employment of the tug while remaining at Bermuda; and it is obvious if it attached at the time of its date, any employment requiring the movement of the tug from the port where it was then lying, except for the voyage mentioned in the policy, would create a fatal deviation.

" It is however unnecessary in this opinion to inquire into the force or significance of the words referred to as affecting the rights of the respective parties to the policy previous to the time when the voyage policy attached, inasmuch as it was substantially conceded by the parties on the argument that the question of deviation depended mainly upon the time

when the voyage risk commenced under the policy. If such a liability was incurred under this policy as is known and described by its terms as a 'port risk,' it certainly terminated when the voyage risk commenced, and affects the question under discussion only as it may aid in determining when the latter risk actually commenced.

"A deviation from the described course or employment of an insured vessel, unless compelled by necessity at any time after the liability under the policy attaches, constitutes a defence to an action thereon for a subsequent loss, however slight or harmless the deviation may appear to be. 3 Kent Com. 312; *Stevens v. Com. Mut. Ins. Co.*, 26 N. Y. 402; *Fernandez v. Gt. West. Ins. Co.*, 48 id. 572; s. c. 8 Am. Rep. 571. Neither is it material whether such deviation occurs during the time while the vessel is in port waiting for the voyage to commence, or takes place thereafter, provided the policy covers the period of waiting by the use therein of the terms, 'at and from' the port specified. *Fernandez case, ante*.

"The time when a liability under a policy of insurance upon freight attaches to the subject of insurance under the language 'at and from' a certain port, is well settled to be, from the time it is placed on the vessel, in preparation for the voyage contemplated. *Mellish v. Allnutt*, 2 M. & S. 106; *Smith v. Mobile, &c., Ins. Co.*, 30 Ala. n. s. 167; *Mobile, &c., Ins. Co. v. McMillan*, 31 id. 711; *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 14; 2 Am. Dec. 130.

"In the case of an insurance upon a vessel lying in port, for a voyage risk, described as being 'at and from' a given port, it is quite uniformly held that the policy attaches at the time of the commencement of the preparations for the voyage. *Taylor v. Lowell*, 3 Mass. 347; 3 Am. Dec. 141; *Kemble v. Bowne*, 1 Caines (N. Y.), 75; *Grant v. King*, 4 Esp. 174; *Seamans v. Loring*, 1 Mas. (U. S. C. C.) 128; *Phillips Ins.*, § 935. When a vessel is insured for a voyage as 'at and from' a certain place, and the ship is not then in port, the policy commences to run from the time it safely arrives at the specified port, and continues during its stay while preparing for the voyage insured against. *Bell v. Bell*, 2 Camp. 475; *Patrick v. Ludlow*, 3 Johns. Cas. (N. Y.) 10; 2 Am. Dec. 130. No force or meaning can be given to the words 'at a port,' as used in such a policy, which does not cover a certain period of time anterior to the actual sailing of the vessel upon her voyage.

"The question to be determined in this case is, what the period of time is, as indicated by the language used in the policy, during which the property insured is under the protection of the insurance. Assuming, as we must, that it covers some time prior to the departure of the vessel from port, we can ascribe no other intention to the parties than that it should cover the time spent in performing that which was the necessary incident of the main object of the contract. In the case of *Fernandez v. Gt. West. Ins. Co.*, *ante*, it was held that a policy of insurance, dated on the 18th day of March, 1863, upon a vessel then in port for a voyage 'at and

from New York to Havana,' to sail in a few days, attached at the date of the policy, and that a trial trip made by the vessel on the 6th of April thereafter, a distance of sixteen miles, to Elizabethport, where she took in coal and then returned to New York, was a fatal deviation, and barred a recovery for a loss subsequently occurring.

"The authorities upon the question of the deviation by a vessel from an insured voyage are very numerous, and seem uniformly to hold the insured to the strictest pursuit of the precise course indicated in the policy for the voyage.

"If the insurance covers the period of the vessel's stay in port, she has no right during that period to engage in any business, except the making of preparation for her voyage, and when those preparations are completed, to sail without delay by the ordinary and usual course for the port of destination. *Reade v. Com. Ins. Co.*, 3 Johns. (N. Y.) 352. In *Brown v. Tayleur*, 4 Ad. & El. 241; s. c. 31 Eng. C. L. Rep. 61, the 'Penrith' was insured 'at and from her port of loading in North America to Liverpool.' The vessel took a part of her cargo at Cocagne, and then went to Buktouche, a village distant from Cocagne about five miles, situated on the waters of the same bay with Cocagne, to complete her cargo. Not finding a cargo there, she returned to Cocagne, and after finishing her loading, sailed from thence for England, and was lost. It was held that the trip to Buktouche constituted a deviation, which avoided the policy.

"This case has been frequently referred to as authority in subsequent cases, and seems to be quite applicable to the one in hand. *Vos v. Robinson*, 9 Johns. (N. Y.) 192, is also very much in point. The insurance was 'at and from Port Plata, St. Domingo, to New York.' Cargoes are never taken on board at La Plata, but it was the custom of trade to pick up a cargo on the coast near that port, in the district of La Plata. While attempting to gather a cargo within that district, the vessel was lost, owing to the violence of the winds which drove her upon the rocks. This was held a deviation which forfeited the policy. In *Kettell v. Wiggin*, 13 Mass. 68, the vessel was insured 'from Boston to Gibraltar, and from thence to her port of discharge in the United States, with liberty to proceed to St. Ubes on the Cape de Verd islands for salt.' The vessel arrived at the Cape de Verd islands, and while waiting for a cargo was induced by the governor of the islands, upon a promise to load her earlier than she could otherwise get a cargo, to go to St. Jago and Fuego, two other of the Cape de Verd islands, to bring a cargo of provisions to Isle of May. The captain of the vessel consented to do so, and was thereby enabled to obtain her cargo of salt several weeks earlier than could otherwise be done. The vessel was afterward lost by the perils insured against; and it was held that the trip to St. Jago was a deviation which forfeited the policy. A similar application of the principle was made in *Stevens v. Com. Mut. Ins. Co.*, 26 N. Y. 397.

“ An examination of the facts of this case shows that it is clearly within the principles laid down with great uniformity, not only by elementary writers, but also in the reported cases above cited. The undisputed evidence in the case shows, that active preparation for the voyage in question commenced at the Port of St. Georges, on June 30, 1879, and continued until the vessel took her departure. On that day a captain, specially hired for the voyage, went on board. The keeping of the log was then commenced by him, and was continued daily from that time until the occurrence of the loss. Carpenters were then at work on the tug, fitting her for the ocean voyage. These preparations continued on July 1; on July 2, the crew were shipped, and the captain entered in the log the fact of his taking charge of the vessel. He was on that day paid the agreed price for his services for the voyage, by the plaintiff's agent. On July 3 the preparations for the voyage were continued; provisions and water were taken on board, and clearance papers taken out from the custom house at St. Georges, for a voyage from that place to New York.

“ After these preparations had commenced, and on July 2, the ‘ Ackermann ’ left her berth at St. Georges and steamed to Hamilton, a distance of about twenty miles, and taking the ‘ Eliza Barss,’ a schooner, from that port in tow, brought her back to St. Georges, and from there towed her out to sea to Five Fathoms Hole, a distance of about five miles from St. Georges. After casting her off the tug returned to her berth at St. Georges, and continued the preparations for her voyage to New York. On July 3, after receiving her clearance papers from the custom house at St. Georges, for New York, the tug towed to sea the schooner ‘ Hound,’ through St. Georges’ channel, and then returned to the interior waters of the Bermudas, and proceeded to the port of Hamilton. From this port, after taking on coal and a life-boat, she started for New York, through a long, intricate, and dangerous channel, known as ‘ Chub Cut,’ on the morning of July 4.

“ Without considering the question as to whether the ‘ Chub Cut ’ channel, as distinguished from the St. Georges’ channel, was the usual and ordinary course for vessels of the character and capacity of the ‘ Ackermann,’ to pursue upon a voyage from the Bermudas to New York, we are of the opinion that the trips performed by the tug on the second and third days of July, respectively, in towing out to sea the schooners ‘ Eliza Barss ’ and ‘ Hound ’ were such deviation from the voyage and perils insured against as vitiated her insurance.

“ That the voyage actually commenced at St. Georges on the third day of July conclusively appears, not only from the entries in the log made by the captain of the tug, but also by the protest sworn to before the United States commercial agent at St. Georges, July 7, by the captain, chief engineer, and seamen of the ‘ Ackermann ’ after the loss had occurred, and which were produced in evidence by the plaintiffs on the trial.

“ It thus appears that after the voyage had actually commenced the tug

departed from it, and taking the 'Hound' in tow, steamed in an opposite direction from the one she intended to pursue upon her voyage, and proceeded five miles to sea, presumably under hire, and then after discharging her tow returned to prosecute the voyage insured against.

"This trip was, we think, within all of the authorities, a fatal deviation. Whatever contention may arise over other questions in the case, it cannot, we think, be questioned that a vessel which leaves the port of her departure in pursuit of the insured voyage without the intention of returning, has commenced her voyage in such a sense as to be protected by a policy of insurance covering her from perils during such voyage, and that an independent voyage undertaken by her, after such a departure, causes a forfeiture of her insurance. Thus it was held in *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453, where a vessel was insured under a 'port risk,' and was swept by the tide upon a rock, and injured while being towed out of the harbor, that she was not protected by such an insurance, and that when she left the pier at which she had been moored the 'port risk' terminated, and the 'voyage risk' began.

"It seems to us that when the 'Ackermann' left St. Georges her 'voyage risk' clearly commenced, and her subsequent employment in towing the 'Hound' to sea not only increased the perils, but subjected the insurers to liabilities which they had not contracted for. As was said in the case of *Kettell v. Wiggins*, *ante*, 'to test this, let us inquire whether the vessel was at the risk of the underwriters from the Isle of May to Fuego and back. It was not within the terms of the policy; it was not necessary unless it had become so by the culpable neglect of the master. Had the vessel been lost upon that voyage, the underwriters could not have been held answerable. The policy then had ceased to protect the vessel, and it is not possible that anything subsequent should restore the obligations of the underwriters.'

"We are therefore of the opinion that the judgment should be reversed and a new trial ordered, with costs to abide the event."

NOTE 50. See NOTE 49.

NOTE 51. See NOTE 49, *ante*.

NOTE 52. See NOTE 49, *ante*.

NOTE 53. **Abandonment, Effect of.** — If a vessel is stranded, and after the exercise of the best efforts of the master and crew she cannot be got off, and the stranding is of such a character that, in the exercise of good judgment, it is hopeless to get her off, an abandonment is lawful. *Howland v. Marine Ins. Co.*, 2 Cranch (U. S. C. C.), 474. So if the vessel is injured so that she cannot be repaired for one half her value at the place of the disaster: *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 221;

Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604; *Peele v. Merchants' Ins. Co.*, 3 Mas. (U. S.) 28; *Abbott v. Broome*, 1 Caines (N. Y.) 292; *Center v. American Ins. Co.*, 4 Wend. (N. Y.) 45; *Dickey v. N. Y. Ins. Co.*, 3 Wend. (N. Y.) 658; *Peters v. Phenix Ins. Co.*, 3 S. & R. (Penn.) 25; *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. (N. Y.) 482; *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Wood v. Lincoln, &c. Ins. Co.*, 6 Mass. 479; *Hall v. Merchants' Ins. Co.*, 21 Pick. (Mass.) 472; unless the underwriters agree to pay for the repairs at all events. *Hart v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 346.

The fact that a bottomry bond has been given in a foreign port for more than one half the value of the ship is not necessarily nor *per se* a sufficient cause for abandonment. *Humphreys v. Union Ins. Co.*, 3 Mas. (U. S.) 429. Nor, on the other hand, even if the cost of repairs fall short of one half the value of the vessel, does this fact prevent an abandonment, especially where the facts show a case of extreme hazard and a probable expense exceeding half the value of the ship. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378. And, according to the case last cited, the value at the place of repairs is the standard, and neither the valuation in the policy at the home port or in the general market is admissible in ascertaining whether the value was more than half the value.

So, if in consequence of an illegal seizure and recapture the voyage is lost, the owners may abandon for a total loss. *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. As to what amounts to a loss of the voyage, see *Symonds v. Ins. Co.*, 4 Dall. (U. S.) 417; *Humphreys v. Union Ins. Co.*, 3 Mas. (U. S.) 429; *Magoun v. N. E. Ins. Co.*, 1 Story (U. S.), 157; *Lawrence v. New Bedford Ins. Co.*, 2 id. 471; *King v. Middletown Ins. Co.*, 1 Conn. 184; *King v. Hartford Ins. Co.*, 1 id. 333; *Prince v. Equitable, &c. Ins. Co.*, 12 Gray (Mass.); 527; *Paddock v. Commercial Ins. Co.*, 2 Allen (Mass.), 93; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *Speyer v. New York Ins. Co.*, 3 Johns. (N. Y.) 88; *Jumel v. Marine Ins. Co.*, 7 id. 412; *Whitney v. N. Y., &c. Ins. Co.*, 18 id. 208; *Dickey v. New York Ins. Co.*, 4 Cow. (N. Y.) 222; *Center v. American Ins. Co.*, 7 id. 564; *City Bank v. Northwestern Ins. Co.*, 30 N. Y. 251; *Callender v. Ins. Co.*, 5 Binn. (Penn.) 525; *American Ins. Co. v. Francia*, 9 Penn. St. 390. But the mere taking and detention of a neutral vessel by a belligerent for the purpose of adjudication is not a good ground for an abandonment. *Duncan v. Kach, Wall.* (U. S. C. C.) 33; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. (U. S. C. C.) 400.

If, however, a vessel is seized in a foreign port for an alleged violation of the revenue laws, and on trial is restored, but by long delay and exposure in consequence of the proceedings is unfit to perform the voyage without repairs which will exceed the value of the vessel, the owners may abandon. *Magoun v. N. E. Marine Ins. Co.*, 1 Story (U. S.), 157.

If, after the voyage is commenced, the vessel is detained by an embargo, the assured may abandon for a total loss. *Ogden v. Firemen Ins. Co.*, 10

Johns. (N. Y.) 177; *McBride v. Marine Ins. Co.*, 5 *id.* 299; *Walden v. Phenix Ins. Co.*, 5 *id.* 310. So it seems that an abandonment is justified, if the commander of a convoy makes a friendly capture of one of the vessels under his charge. *Goveneur v. United Ins. Co.*, 1 *Caines (N. Y.)*, 592. But if the policy contains a condition that the vessel shall not be abandoned until condemned, the provision is binding, and although the vessel is captured and released, but in consequence is denied entry at the port of destination, there can only be a recovery for a partial loss. *Speyer v. N. Y. Ins. Co.*, 3 *Johns. (N. Y.)* 88. The loss of the cargo by seizure does not justify an abandonment of the vessel. *Alexander v. Ins. Co.*, 4 *Cranch (U. S.)*, 870.

As soon as notice is received, a capture as prize will justify an abandonment if the loss continues up to that time. *Queen v. Union Ins. Co.*, 2 *Wash. (U. S. C. C.)* 331.

In all cases, the right to abandon and recover for a total loss depends upon the state of the fact at the time of the offer to abandon, and not on the state of the information received. *Olivera v. Union Ins. Co.*, 3 *Wheat. (U. S.)* 183; *Marshall v. Del. Ins. Co.*, 2 *Wash. (U. S. C. C.)* 54; *Rhinelander v. Ins. Co.*, 4 *Cranch (U. S.)*, 29. And such a right does not exist, if at the time when the offer was made a decree of restitution had been made, although it was not executed. And the right to abandon must be exercised within a reasonable time after notice of the loss. *Chesapeake Ins. Co. v. Stark*, 6 *Cranch (U. S.)*, 268. And if the assured refused to abandon the vessel when he abandoned the cargo, his right to abandon is lost and cannot be regained. *Hurtin v. Ins. Co.*, 1 *Wash. (U. S. C. C.)* 400. If, at the time of an injury to the vessel, there is an insurance upon a perishable cargo, which will be ruined by the delay incident to making the repairs, there may be an abandonment for a total loss. *Robinson v. Ins. Co.*, 3 *Sumn. (U. S.)* 220.

An abandonment cannot be made by the master, but his act may be ratified by the owners. *Younger v. Gloucester Ins. Co.*, 2 *Curtis (U. S.)*, 322. An agent who effected the insurance may abandon. *Chesapeake Ins. Co. v. Stark*, 6 *Cranch (U. S.)*, 357.

In all cases, an abandonment must be made within a reasonable time after notice of the loss, and what is a reasonable time is a mixed question of fact in view of all the circumstances. *Smith v. Del. Ins. Co.*, 3 *Wash. (U. S. C. C.)* 127; *Bell v. Beveridge*, 4 *Dall. (U. S.)* 272; *Pierce v. Ocean Ins. Co.*, 18 *Pick. (Mass.)* 83; *Reynold v. Ocean Ins. Co.*, 22 *id.* 191; *Marine Ins. Co. v. Tucker*, 3 *Cranch (U. S.)*, 357; *Duncan v. Koch, Wall. (U. S. C. C.)* 33; *Livingston v. Maryland Ins. Co.*, 7 *Cranch (U. S.)*, 506. And a delay of two months has been held unreasonable, in the absence of evidence that the delay was necessary to enable the assured to ascertain the real extent of the injury. *Toler v. China Mut. Ins. Co.*, 131 *Mass.* 239. Where, on the 17th of October, the owner of a neutral vessel insured received notice of a seizure for breach of a blockade, and on the 16th of November

notice of a peace having been declared between the belligerents was received at the town where he lived, and where the insurers kept an office, and on the 20th of November he abandoned to the insurers, it was held to have been too late, although he was away from home for two or three days before the 20th. *Livermore v. Newburyport Ins. Co.*, 1 Mass. 264; *Smith v. Newburyport Ins. Co.*, 4 Mass. 668; *Orrok v. Com. Ins. Co.*, 21 Pick. (Mass.) 456; *Krumbhaar v. Marine Ins. Co.*, 1 S. & R. (Penn.) 281. Where a ship was abandoned under a policy containing a clause that no abandonment should be made for detention until proof that it had continued three months, it was held, in apportioning the premium, that the abandonment had relation back to the beginning of the detention, and that the risk was then at an end. *Loving v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. (N. Y.) 1. Pestilence excuses the insured from making an abandonment immediately after knowledge of the ship's loss. *M'Calmount v. Murgatroyd*, 3 Yeates (Penn.), 27. The assured has no right to wait, in order to find out the extent of a loss on the sale of property assured and deteriorated by perils insured against, before abandonment. The right does not depend upon events which take place after the peril is over. *Teasdale v. Charleston Ins. Co.*, 2 Brev. (S. C.) 190.

But the owner need not abandon until he has received certain information of the loss: *Duncan v. Koch*, *ante*: and an offer to do so as soon as he receives preliminary proofs of loss, is in time. *Gardner v. Columbian Ins. Co.*, 2 Cranch (U. S. C. C.), 550.

No particular form of notice is required, but any notice to the underwriters which clearly informs them of the intention of the assured to abandon, is sufficient: *Patapsco Ins. Co. v. Hazard*, *ante*; if it states the cause of the loss, and because of a peril insured against. *Bullard v. Ins. Co.*, 1 Curtis (U. S.), 148. If an insufficient cause is stated, the assured cannot at the trial rely on a cause not stated. *King v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 300. And upon the other hand, if a sufficient cause is stated the assured need not state other causes, although known to him. *Dederer v. Ins. Co.*, 2 id. 61.

The assured may abandon for a total loss, on information of a capture, though the vessel is afterwards released and arrives at her port of destination. *Slocum v. Ins. Co.*, 1 Johns. Cas. (N. Y.) 151; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Bohlen v. Del. Ins. Co.*, 4 Binn. (Penn.) 430. In case of the capture of the ship, if the assured abandons and receives the amount of the loss, and after condemnation the property is purchased by him or his agent, the purchase will enure to the benefit of the insurer at his election; and if the property thus purchased be vested in other articles by the agent of the assured, which are transmitted by him to his principal, who sells them, trover lies by the insurer; for by his affirmance of the acts of the agent he obtains an absolute property in the goods, and the subsequent sale by the assured amounts to a conversion.

Robinson v. United Ins. Co., 1 Johns. (N. Y.) 592. A law of the country to which the vessel was bound, subjecting vessels which arrived there under certain circumstances to confiscation, is not a just cause for breaking up the voyage unless it appear with moral certainty that the law applied to the present case, and that, had the ship arrived, it would have been enforced against her. *Craig v. United Ins. Co.*, 6 Johns. (N. Y.) 226. But if after the voyage has been commenced the vessel insured is stopped and detained in consequence of an embargo laid by the government of the United States, whether for a limited or indefinite period, the assured may abandon for a total loss. *McBride v. Marine Ins. Co.*, 5 Johns. (N. Y.) 299; *Walden v. Phoenix Ins. Co.*, id. 310. Where a policy contained a clause warranting not to abandon in case of capture or detention until six months after notice thereof to the insurers, and the vessel was condemned in less than a month after her capture, it was held that the assured might abandon immediately after condemnation; the warranty being confined to the cases of capture and detention only. *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273; *Shapley v. Tappan*, 9 Mass. 20; *Law v. Goddard*, 12 Mass. 112; *Delano v. Bedford Ins. Co.*, 10 Mass. 347; *Thatcher v. Bellows*, 13 Mass. 111; *Mumford v. Church*, 1 Johns. Cas. (N. Y.) 147; *Lovering v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Reynolds v. Ocean Ins. Co.*, 22 id. 191; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Gracie v. New York Ins. Co.*, 8 id. 237; *Corp. v. United Ins. Co.*, id. 277; *Saltus v. United Ins. Co.*, 15 id. 523.

The mere stranding of a ship on a bar will not, of itself, justify an abandonment. The master and crew are bound to use their best exertions to get her off. *Howland v. Marine Ins. Co.*, 2 Cranch (U. S. C. C.), 474. But if the stranding is of such a character as to render it, in good judgment, hopeless to get the vessel off, then an abandonment was justifiable. *King v. Hartford Ins. Co.*, 1 Conn. 422. If a stranded or sunken vessel is got off or raised and repaired at an expense less than one half, &c., a previous abandonment will not avail. *Wood v. Lincoln & Kennebeck Ins. Co.*, 6 Mass. 479; *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Sewall v. United States Ins. Co.*, 11 Pick. (Mass.) 90; *Lincoln v. Hope Ins. Co.*, 8 Gray (Mass.), 22; *Ludlow v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 335; *Allen v. Mercantile, &c. Ins. Co.*, 46 Barb. (N. Y.) 642. The clause in the policy "that the insured shall not have the right to abandon the vessel, for the amount of damage merely, unless the amount which the insured would be liable to pay under an adjustment for a partial loss shall exceed half the amount insured," is solely applicable to the case of an insurance on the ship, and has nothing to do with an insurance on the cargo. *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220. Where a voyage is broken up and there is a loss of more than half on the freight which is insured, the insured may abandon for a constructive total loss; and this right is not impaired by the safe arrival of the mer-

chandise on another vessel, on which it has been reshipped at the port of destination. *Rogers v. Nashville Ins. Co.*, 9 La. An. 537. The doctrine of abandonment for a constructive total loss does not appear to apply to a contract of affreightment. *Henderson v. Maid of Orleans*, 12 La. An. 352. On a policy of insurance on freight against a total loss the assured, who loses only a part, is not entitled to abandon for a technical total loss. *Willard v. Miller, &c. Ins. Co.*, 24 Mo. 561. Where there is an insurance on freight, and the vessel receives a slight injury and the cargo is taken out much deteriorated, but the vessel is still in safety, an abandonment of ship and freight not expressly accepted by the insurers cannot be made, especially where the vessel can be repaired at a small expense. The assured in such a case should carry the cargo to the place of destination, to entitle him to full freight. To justify an abandonment in case of stranding the goods must be deteriorated to half their value. *Ludlow v. Columbian Ins. Co.*, 1 Johns. (N. Y.) 335. Where cargo and profits are insured separately, an abandonment of the cargo to the insurer on cargo does not preclude the insured from recovering a total loss on the policy on profits. *Mumford v. Hallett*, 1 Johns. (N. Y.) 433. Where different sorts of goods are specified and separately valued in the same policy, the insured may abandon any one sort or article, in case of loss, and retain the rest in the same manner as if the different articles had been insured by different policies. *Deidericks v. Com. Ins. Co.*, 10 Johns. (N. Y.) 234. A vessel laden with perishable articles from Baltimore to Portland, Oregon, being injured off Cape Horn, put back to Rio Janeiro, where she was surveyed, condemned, and sold, as was the cargo, which had deteriorated and could not be shipped in whole or in part to the port of destination. In an action against the insurance company for the insurance, it was held that it was a case for abandonment as for a total constructive loss. *Delaware Ins. Co. v. Winter*, 38 Penn. St. 176. The right of the insured to abandon for a total loss depends upon the state of the fact at the time of the offer to abandon, and not upon the state of the information received. *Marshall v. Delaware Ins. Co.*, 4 Cranch (U. S.), 202; *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 183; *Marshall v. Del. Ins. Co.*, 2 Wash. (U. S.) 54. Where a technical total loss is sought to be maintained upon the mere ground of the deterioration of the cargo at an intermediate port to a moiety of its value, all deteriorations of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. *Marcadier v. Ches. Ins. Co.*, 8 Cranch (U. S.), 39. Damages to vessel by perils of sea on the voyage insured which cannot be repaired at the port to which she proceeds after the injury, without expending an amount exceeding half her value at that port after such repairs, constitute a total loss. *Patapsco Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604; *Bradlie*

v. Maryland Ins. Co., 12 Pet. (U. S.) 378; *Robinson v. Com. Ins. Co.*, 3 Sumn. (U. S.) 220; *Smith v. Man. Ins. Co.*, 7 Met. (Mass.) 448; *Greely v. Tremont Ins. Co.*, 9 Cush. (Mass.) 415; *Goold v. Shaw*, 1 Johns. Cas. (N. Y.) 293; *Budd v. Union Ins. Co.*, 4 McCord (S. C.), 1; *Cohen v. Ins. Co.*, Dudley (S. C.), 147; *Smith v. Universal Ins. Co.*, 6 Wheat. (U. S.) 176. It is not the incapacity of the assured to abandon or his failure to do so which can defeat his right to a recovery, unless he claims for a total loss. *Murray v. Ins. Co. of Pennsylvania*, 2 Wash. (U. S.) 186.

There is no instance where the insurer can demand for a total loss simply because he declined making an abandonment, and demanded a partial loss, when he should have abandoned and demanded a total loss. *Mareau v. United States Ins. Co.*, 3 Wash. (U. S.) 256. The insured cannot recover for a total loss without proof of an abandonment. *Townsend v. Phillips*, 2 Root (Conn.), 400. Where there is a constructive total loss of a vessel, and she is abandoned, the freight may be abandoned, although the vessel is afterwards repaired and proceeds on the voyage, and earns all the freight, and, there being a constructive total loss of the vessel, freight insured may be recovered. *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341. Though the policy require sixty days' notice of an abandonment, the same letter containing the notice may operate as an abandonment, at the end of sixty days. *Columbian Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383. The right of abandonment does not depend upon certainties, nor on the highest degree of probabilities of a total loss, nor is it affected by subsequent events, having been once properly exercised in a case of extreme hazard. *Wallace v. Thames, &c. Ins. Co.*, 22 Fed. Rep. 66. And where a ship has been voluntarily stranded and abandoned to the underwriters, the underwriters by subsequently raising her and tendering her back to the assured cannot relieve themselves from liability as for a total loss, as by their acts they are as a matter of law deemed to have accepted the abandonment. *Northwestern Trans'n Co. v. Continental Ins. Co.*, 24 Fed. Rep. 171. See *Young v. Union Ins. Co.*, 24 Fed. Rep. 279. A notice to the president of the company by the assured that "the vessel insured by your policy is abandoned," is a sufficient notice of abandonment. *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399. An abandonment may be waived before acceptance, and the question whether it has been waived or not is generally one of intention for the jury. It is not every act of ownership by the assured that is necessarily to be construed as a waiver. Thus a vessel being stranded, and a sale recommended by surveyors, the act of a part-owner, who was on the spot and ignorant whether the abandonment would be accepted or not, in directing the sale to proceed was held not to be *per se* a waiver of the abandonment. An offer by one professing to act as agent of the underwriters before an abandonment had been accepted or refused, to pay the expense of getting the vessel off and putting her in a condition to prosecute her voyage, does not put an end to the abandon-

ment. *Columbian Ins. Co. v. Ashby*, 4 Pet. (U. S.) 139; *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.), 595. The waiver of an abandonment by a prior insurer does not affect the relations between the insured and a second insurer. *McKim v. Phoenix Ins. Co.*, 2 Wash. (U. S. C. C.) 89. An abandonment once made is considered a continuing one, notwithstanding a refusal to accept, unless withdrawn. *The Sarah Ann*, 2 Sumn. (U. S.) 206. It is not the incapacity of the assured to abandon, or his failure to do so, that can defeat his right to a recovery, unless he claims for a total loss. *Murray v. Insurance of Pennsylvania*, 2 Wash. (U. S. C. C.) 186. The right to abandon may be kept in abeyance, by mutual consent. *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.), 274. A clause in the policy providing that the acts of the insured or insurers in recovering, saving, and preserving the property, in case of disaster, shall not be considered as a waiver or acceptance of an abandonment, applies only to its relief from present peril, and the temporary care of the property. *Gloucester Ins. Co. v. Younger*, 2 Curtis (U. S.), 322.

In order to justify an abandonment there must be a loss by some one of the perils insured against. Mere fear or apprehension that a loss will result is not sufficient. *Smith v. Ins. Co.*, 6 Wheat. (U. S.) 176; *Messonier v. Union Ins. Co.*, 1 N. & McCord (S. C.), 155; *Corp. v. United Ins. Co.*, 8 Johns. (N. Y.) 477; *Craig v. United Ins. Co.*, 6 id. 226; *King v. Hartford Ins. Co.*, 1 Conn. 422; *Amory v. Jones*, 4 Mass. 221; *Tucker v. United Ins. Co.*, 12 Mass. 288; *Lee v. Gray*, 7 id. 349; *Richardson v. Maine Ins. Co.*, 6 id. 102. Of course the assured is not bound to abandon, and if he declines to do so he may nevertheless recover the actual damage sustained. *Suydam v. Marine Ins. Co.*, 2 Johns. (N. Y.) 138; *Peele v. Merchants' Ins. Co.*, 3 Mass. 27. In case of an abandonment he is entitled to a total loss, but he may waive this right and sue only for his actual loss. *Baseley v. Chesapeake Ins. Co.*, 3 G. & J. (Md.) 450.

The capture of a neutral vessel as prize by belligerents is a total loss, for which the assured may abandon. *May v. Tunno*, 2 Bay (S. C.), 307; *Richardson v. Maine Ins. Co.*, 6 Mass. 102; *Martin v. Salem Ins. Co.*, 2 id. 420; *Dorr v. N. E. Ins. Co.*, 4 id. 221; *Brown v. Phenix Ins. Co.*, 4 Binn. (Penn.) 445; *Law v. Goddard*, 12 Mass. 112; *Delano v. Bedford Ins. Co.*, 10 id. 347; *Rhineland v. Ins. Co.*, 4 Cranch (U. S.), 29; *Tucker v. United Ins. Co.*, 12 Mass. 288; *Queen v. Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; *Perego v. Dale*, 3 Johns. Cas. (N. Y.) 156; *Murray v. United Ins. Co.*, 2 id. 263; *Smith v. Steinbach*, 2 Caines Cas. (N. Y.) 158; *Munson v. N. E. Ins. Co.*, 4 Mass. 88. But if a recapture is made with a view to salvage, and this does not amount, with the expenses, to more than one half the value of the property, and only a temporary interruption of the voyage is occasioned by the recapture, the assured cannot abandon. *Queen v. Ins. Co.*, 2 Wash. (U. S.) 231.

The assured is bound to repair a vessel which has become unseaworthy if he can do so for less than one half her value, and there are facilities for

repairing her at the port where she is. Or, if she can be safely navigated to a port where she can be repaired, under the conditions before stated, he is bound to take her there. *Hall v. Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Clarke v. Mass. Ins. Co.*, 2 id. 104; *Orrok v. Ins. Co.*, 21 id. 456. So, if the vessel is disabled, but another can be procured to take the freight to its port of destination, it is the duty of the master to procure it, and forward the cargo, or the underwriters will be discharged as to the cargo. But this rule does not apply when it would be necessary to send to a distant port for a vessel, or when the undertaking would be attended with great difficulty and delay. *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270. Indeed, it may be regarded as the rule, that the master is not bound to look beyond the port of distress, or one contiguous thereto, for a vessel to carry on the freight. *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107.

An abandonment when accepted has all the effect of the most accurately drawn assignment, and the underwriter thereby becomes entitled to all that can be realized from the property covered by the policy, and the right to indemnity for an unjust capture vests in the underwriters. *Comegys v. Passe*, 1 Pet. (U. S.) 193; *Ins. Co. v. Cargo, Olc.* (U. S.) 89; *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.), 208; *Hurtin v. Phoenix Ins. Co., Olc. Adm.* (U. S.) 89; *Norton v. Lexington, &c. Ins. Co.*, 16 Ill. 235; *Phillips v. St. Louis Ins. Co.*, 11 La. An. 459; *Graham v. Ledda*, 17 id. 45; *Peirce v. Ocean Ins. Co.*, 18 Pick. (Mass.) 83; *Smith v. Touro*, 14 Mass. 112; *Oliver v. Newburyport Ins. Co.*, 3 id. 37; *Badger v. Ocean Ins. Co.*, 23 Pick. (Mass.) 347; *Gould v. Citizen Ins. Co.*, 13 Mo. 524; *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141; *Union Ins. Co. v. Burrell*, Anth. (N. Y.) 128; *Gardere v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 514; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Atlantic Ins. Co. v. Storrow*, 1 Edw. (N. Y.) 621; *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200. An abandonment to the underwriters is not a ratification of an unauthorized sale by the master. *Ward v. Peck*, 18 How. (U. S.) 267. But the underwriters have no right to take possession of a ship, either to move her or to repair her, when she has been abandoned, without consent of the owners, and if they do so it amounts in law to an acceptance of the abandonment. And an abandonment once made and accepted is irrevocable by either party without the assent of the other. *Peele v. Merchants' Ins. Co.*, 3 Mas. (U. S.) 27.

The property vests in the underwriter by relation to the time of the capture or other cause for the abandonment, and the master stands as the insured until the abandonment is actually made. *Dederer v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 61. If an abandonment when made is good, the rights of the parties are fixed; but if it is not then good, subsequent events cannot validate it. *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378. By the acceptance of an abandonment, the underwriters become owners for the voyage; and they are liable for seamen's wages,

and entitled to freight earned, from that period. If the ship and freight are separately insured, after an abandonment to each set of underwriters, the insurers of the freight are entitled to that previously earned, and those of the vessel to her subsequent earnings, and if the underwriters continue the voyage, it is presumed to have been done under the original terms as to compensation of the master and seamen. If the master makes a special contract to receive a moiety of the freight in lieu of wages, and procure insurance on his part of the freight, his abandonment for a total loss does not operate as an assignment of freight subsequently earned. *Hammond v. Essex F. & M. Ins. Co.*, 4 Mas. (U. S.) 196. If the underwriters take possession, after an abandonment, it is in law an acceptance of it, and an abandonment once made and accepted is irrevocable by either party without the assent of the other. *Peele v. Merchants' Ins. Co.*, 3 Mas. (U. S.) 27; *Gloucester Ins. Co. v. Younger*, 2 Curtis (U. S.), 322. If the supercargo invests the proceeds of the outward shipment in another cargo, the underwriters are entitled to the profit on it. *Simonds v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 443. The underwriters upon a cargo are not liable to the owner for freight *pro rata itineris*, in case of abandonment. *Caze v. Baltimore Ins. Co.*, 7 Cranch (U. S.), 358. But unless there has been an abandonment and acceptance, the underwriters can make no claim to salvage property. *The Boston*, 1 Sumn. (U. S.) 328; *The Henry Ewbank*, *id.* 400.

NOTE 54. See NOTE 53.

NOTE 55. See NOTE 53.

NOTE 56. See NOTE 53.

NOTE 57. See NOTE 53.

NOTE 58. See NOTE 53.

NOTE 59. See NOTE 53.

NOTE 60. See NOTE 53.

NOTE 61. See 2 Phillips on Ins., Chaps. 15 & 16.

NOTE 62. See NOTE 61.

NOTE 63. See NOTE 61.

NOTE 64. See 2 Phillips on Ins., Chap. 21.

NOTE 65. Where insured property is destroyed by the negligence of third persons, the insurer is subrogated to the rights of the insured to the extent of the sum paid under the policy. *Hart v. Western R. R. Co.*, 13 Met. (Mass.) 99; *Gracie v. N. Y. Ins. Co.*, 8 Johns. (N. Y.) 245; *Simon v. Leland*, 6 Hill (N. Y.), 237; *Monticello v. Mollison*, 17 How. (U. S.) 152; *Monmouth Co. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

NOTE 66. Where the policy is void, and never attaches, if the premium has been paid it may be recovered back. *Friesmuth v. Agawam Ins. Co.*, 10 Cush. (Mass.) 588; *Mount v. Waite*, 7 Johns. (N. Y.) 334; *Delavigne v. U. S. Ins. Co.*, 1 Johns. Ch. (N. Y.) 310; *Waddington v. United Ins. Co.*, 17 Johns. (N. Y.) 23; *Lawrence v. Ocean Ins. Co.*, 11 id. 241; *Forbes v. Church*, 3 Johns. Cas. (N. Y.) 159; *Graves v. Marine Ins. Co.*, 2 Caines (N. Y.), 339; *Taylor v. Lowell*, 3 Mass. 331; *Steinbach v. Columbian Ins. Co.*, 2 Caines (N. Y.), 132; *Hendricks v. Ins. Co.*, 8 Johns. (N. Y.) 1; *Taylor v. Sumner*, 4 Mass. 56.

NOTE 67. Fire Insurance, Nature of Contract. — Contracts of insurance against loss by fire are essentially contracts of indemnity: *Glendale Manuf. Co. v. Protection Ins. Co.*, 21 Conn. 31; and bind the insurer, in consideration of the premium paid therefor, to pay to the assured for an injury to, or the destruction of the property by fire, the actual value of the property, or the actual damage done thereto not exceeding the sum insured. *Satterthwaite v. Ins. Co.*, 14 Penn. St. 393; *Ill. Ins. Co. v. Stanton*, 57 Ill. 354; *Great Falls, &c. Ins. Co. v. Harvey*, 45 N. H. 292; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St., 402; *Diehl v. Adams Co., &c. Ins. Co.*, 59 Penn. St., 443; *Rhinehart v. Ins. Co.*, 1 Penn. 332; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. (Penn.) 348; *Ins. Co. v. Mayor*, 8 Barb. (N. Y.), 450; *Liscomb v. Boston, &c. Ins. Co.*, 9 Met. (Mass.) 205; *Abbott v. Hampden, &c. Ins. Co.*, 31 Me. 252. The contract is usually evidenced by a writing called a policy, although a merely verbal contract to insure may be valid and binding; and if the contract contemplated the execution of a policy, courts of equity will compel performance, and if there has been a loss, will not only decree the issuance of a policy, but will also compel payment of the loss. *Commercial, &c. Ins. Co. v. Union Ins. Co.*, 19 How. (U. S.) 321; *Trustees, &c. v. Brooklyn F. Ins. Co.*, 19 N. Y. 205; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *Suydam v. Columbus Ins. Co.*, 18 Ohio, 659; *Hallack v. Com. Ins. Co.*, 26 N. J. Eq. 268; *Carpenter v. Mutual Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Davenport v. Peoria, &c. Ins. Co.*, 17 Iowa, 276; *Ide v. Phenix Ins. Co.*, 2 Biss. (U. S. C. C.) 333. In *Angell v. Hartford Ins. Co.*, 59 N. Y. 171, an action was brought upon a parol contract to insure and to issue a policy, made by one Carpenter as agent of the defendant. The plaintiff's

evidence tended to prove that Carpenter was agent of the defendant and had authority to negotiate contracts of insurance, agree upon all the terms, and fill up and deliver policies. That on the 23d of Nov. 1871, he made an agreement with the plaintiff to insure a building for \$1,000, for three years, the premium to be "what the property was rated at," which was thirty dollars, and to make out and deliver to the plaintiff a policy therefor. No policy was delivered or made out as agreed, and on the 13th of January, 1872, the building was destroyed by fire. The court held the plaintiff was entitled to recover the amount agreed to be insured as damages for the breach of the contract. *Kentucky Mutual Ins. Co. v. Jenks*, 5 Ind. 96; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339; *Bragdon v. Ins. Co.*, 42 Me. 259; *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320; *Kelly v. Com. Ins. Co.*, 10 Bos. (N. Y.) 82; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 530; *Western Mass. Ins. Co. v. Duffy*, 2 Kan. 347; *N. E. Ins. Co. v. Robinson*, 25 Ind. 536; *Union, &c. Ins. Co. v. Commercial, &c. Ins. Co.*, 2 Curtis (U. S.), 524. But in all such cases, in order to entitle the party to specific performance by issuance of a policy, a valid contract must be established, and the party must show that he has complied with all the conditions thereof. Thus, where the plaintiff did not establish a contract entered into with an authorized agent of the company, and payment of the premium, the relief was denied. *Deming v. Phenix Ins. Co.*, 68 Ill. 414. But payment of the premium, as well as other conditions, may be waived as a condition precedent, but the burden is on the party applying for relief to establish the waiver. *Davenport v. Peoria Ins. Co.*, *ante*. In *Gerrish, &c. v. German Ins. Co.*, 55 N. H. 355, the plaintiff made a contract with the defendant's agent to insure a quantity of wool for \$3,500 for one year, commencing Sept. 30, 1873, at noon, and the agent agreed to procure and deliver a policy therefor. On Oct. 1, 1873, the wool was destroyed by fire. No policy had been delivered. The plaintiff made preliminary proofs, and demanded a policy and payment of the loss, which was refused. A bill in equity was brought to compel a delivery of the policy and for payment of the loss, and the court held that he was entitled to a decree of specific performance, compelling a delivery of the policy, and, to prevent circuity of action, to compel a payment of the loss.

A contract of insurance, or *to insure*, is established by the same class of proof required to establish any other contract. If there has been any correspondence between the parties relative to the matter, it is competent evidence either to prove or disprove the fact that a contract was made, but is not always conclusive. The burden of establishing it is upon the assured, and he must satisfy the jury that a complete and perfect contract was made, and an agreement was entered into, binding upon the parties. *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625; *McCullough v. Eagle Ins. Co.*, 1 Pick. (Mass.) 280; *Trustees, &c. v. Brooklyn F. Ins. Co.*, 19 N. Y. 305. In *Ide v. Phenix Ins. Co.*, 2 Biss. (U. S.) 333, the agent was familiar with the property, and offered to insure for three years for

a certain premium, which was paid to him by the plaintiff. The policy was not made, but the insured called for it frequently, and, failing to get it, soon after left the State. Before the agent had remitted the premium to the company, the property was burned. The agent appropriated the money to his own use, and never reported the risk. The loss was promptly reported to the agent, who promised that it should be paid at various times between the autumn of 1864 and 1866. In 1866 the agent notified the assured that the company would not pay the loss. The court held that the contract was binding upon the defendants, and that the fact that proofs of loss were not made, or the action brought within a year, was not fatal to a recovery, as the acts of the agent amounted to a waiver of compliance with the conditions. In *Baubie v. Aetna Ins. Co.*, 2 Dill. (U. S. C. C.) 156, the defendants' agent, who was supplied with policies signed in blank, entered into a contract with the plaintiff to insure certain property for him to the amount of \$1,000 for six months, and issued a policy to him therefor, and renewed it for six months after the policy expired. An agreement, however, between the plaintiff and the agent was shown, by which the agent agreed to renew every six months, and draw for the premium. He did not do so, however, and the property was burned. The court held that the contract was binding upon the company, and that the plaintiff could not be affected by any private instructions given the agent, or by any secret limitations upon his powers. See also *Taylor v. Germania Ins. Co.*, 2 Dill. (U. S. C. C.) 282; also *Hotchkiss v. Germania Ins. Co.*, 5 Hun (N. Y.), 90, in which under a very similar state of facts a similar doctrine was held. See *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 418.

As bearing upon the effect of secret instructions to the agent, the case of *Citizen's Mutual Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217, is a strong one. In that case the directors issued instructions to their agents that distilleries were not insurable. The agent, however, in defiance thereof, issued a policy to the plaintiff upon his distillery, and received a premium note from him therefor. The court held that the policy was obligatory, notwithstanding the instructions, and formed a good consideration of the note. See also *Franklin F. Ins. Co. v. Massey*, 33 Penn. St. 221, where the agent was directed to cancel a policy, but neglected to do so, and the company was held responsible for a loss occurring thereafter. *Eliassen v. Henshaw*, 4 Wheat. (U. S.) 228; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Hallock v. Ins. Co.*, 27 N. J. 268; *Belleville Mutual Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Neville v. Merchants', &c. Ins. Co.*, 19 Ohio 452. In *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645, the defendants' agent was authorized to receive applications for insurance, and with the premium forward them to the insurer, when if the company was satisfied with the risk, and recognized the rate of premium, a policy was to be issued binding *as of the time of the agreement*. The agent received a premium *at the estab-*

lished rate of the plaintiff, under an agreement to insure his goods; but before the application was forwarded by him a loss occurred, and the defendants claimed that, as they had not *assented to the premium*, no perfected contract existed. But the court held that as the rate was the *usual rate* charged by the company, it could not arbitrarily object thereto, or reject the risk *after a loss*. WOODWORTH, J., in a very able opinion, discussed the relative rights of the assured and the insurer in such cases, and clearly illustrated the rule, that a court of equity would, in all cases, enforce a contract entered into by the insurer's agent, within his apparent power, when there was no fraud on the part of the assured, *and a loss had intervened*, which was evidently the only ground which induced the action of the company. The court decreed payment of the amount of the loss. See also to same effect, *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Leeds v. The Mechanics' Ins. Co.*, 8 N. Y. 351. If the premium is not fixed, and there is anything to show that the amount was in dispute, so that the presumption as to former or customary rates does not apply, no contract exists; or if any essential details of the contract are not agreed upon, — as if the apportionment of the risk is not determined, or if the risk is not as described by the assured, or if the policy has not been accepted, or its terms assented to; if the duration of the risk has not been agreed upon, or, in other words, that all the material terms of the contract have been settled, so that nothing is left open for future adjustment. *Orient Mutual Ins. Co. v. Wright*, 23 How. (U. S.) 401; *First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153. In *Christie v. N. British*, 3 C. C. (Sc.) 360, the Lord Justice Clerk said: "If the premium in this case had been agreed on, the insurance would have been effected, although no policy was delivered; but the premises here cannot be held to have been insured, the premium never having been determined on, *and never having been fixed by the Phœnix office.*" *Phlato v. Merchants', &c. Ins. Co.*, 38 Mo. 248; *Mutual Life Ins. Co. v. Young*, 5 Ins. L. J. 17; *Winnisheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Bidwell v. St. Louis Floating Dock Ins. Co.*, 4 Mo. 42; *Sandford v. Trust F. Ins. Co.*, 11 Paige Ch. (N. Y.) 547; *Chase v. Hamilton*, 20 N. Y. 52; *Watt v. Ritchie*, F. D. (Sc.) 43; *Mead v. Westchester Ins. Co.*, 64 N. Y. 453; *Goddard v. Monitor Ins. Co.*, 108 Mass. 56.

NOTE 68. **What is Covered by the Policy.** — When a policy is specific as to the subject-matter of the risk, it cannot be extended by implication, nor is evidence admissible to show that the parties intended to have it cover property not specified. In *Liebenstein v. Ætna Ins. Co.*, 45 Ill. 303, the policy covered "chair lumber" contained in the two-story frame building occupied by the insured as a chair manufactory, situated on the north side of Superior Street. There was an engine-house near this building connected with it by a platform, and used as a part of the plaintiff's factory, and considerable chair lumber was stored therein.

The plaintiff insisted that it was intended by the parties to embrace the chair lumber therein in the risk, and that the policy should be construed as covering it, but the court very properly held that the intention of the parties must be gathered from the policy itself, and that as the risk was restricted to the lumber in the two-story frame building, the company could only be made liable for the loss of the lumber destroyed therein. See also *Lycoming Ins. Co. v. Updegraff*, 40 Penn. St. 311; *Annapolis R. R. Co. v. Bathmore F. Ins. Co.*, 32 Md. 37. The universal rule is, that a policy cannot be extended beyond its plain terms, so as to embrace risks not fairly covered by the description of the risk. *Woxahachie Bank v. Lancashire Ins. Co.*, 62 Tex. 461; *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513; *Grandin v. Rochester, &c. Ins. Co.*, 107 Penn. St. 26, s. p. *Fuchs v. Germantown, &c. Ins. Co.*, 60 Wis. 286. But an insurance on a building "and its additions" will cover such proximate buildings as are used together and form a part of the system of the particular business described in the policy as being that to which the building insured is devoted, although the buildings are distinct, but are connected by boards nailed to each. *Cargill v. Millers', &c. Ins. Co.*, 33 Minn. 90.

A policy covering household furniture does not include wearing apparel, or jewelry, or a watch, or other articles of personal adornment. *Clary v. Protection Ins. Co.*, 1 Ohio, 227. When a policy covers a particular business or class of property, as "a starch manufactory," "a woollen factory," &c., it covers all fixtures, machinery, implements, tools, &c., necessary or incident to the business. *Peoria, &c. Ins. Co. v. Lewis*, 18 Ill. 553. In a Massachusetts case, *Searey v. Central, &c. Ins. Co.*, 111 Mass. 540, the policy covered an "engine and machinery for the manufacture of tin ware," and it was held that the policy covered all the implements used with the machinery as a part thereof, although not connected with the machinery, and that the insurer was liable for the loss of six hundred dies used to give form to various articles manufactured, although a single pair of these dies only could be used at a time, the others, when not in use, being kept on shelves. The same rule was applied in a New York case, *Moadinger v. Mechanics', &c. Ins. Co.*, 2 Hall (N. Y.), 490. In that case, a policy issued upon the assured's "stock in trade as a baker," and upon "household furniture contained in a frame dwelling and bake-house," and it was held that all the implements necessary for carrying on the business, as pans, sieves, bread-troughs, &c.

In *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259, a policy upon "articles used in packing hogs, cattle," &c., was held to cover coal used upon the premises, necessary to be used in the process of packing, and in reasonable quantities for the business done. In *Haley v. Dorchester, &c. Ins. Co.*, 12 Gray (Mass.), 545, a policy upon "stock in trade, being mostly chamber furniture in sets and other articles usually kept by furniture dealers," was held to cover varnish and oils necessary for use in the business; and in *Spratley v. Hartford F. Ins. Co.*, 1 Dill. (U. S. C. C.) 392, a policy

upon "blacksmith and carriage-makers' stock, manufactured and in process of manufacture," was held to cover raw or unmanufactured stock used in the business. A policy upon "stock, wearing apparel, and household furniture in a grocery store and dwelling-house" does not cover linen sheets and shirts smuggled into the country for clandestine sale. *Clary v. Protection Ins. Co., ante.*

But the fact that the property insured is not in actual use at the time of loss, does not defeat the policy as to that, if it is intended for the uses contemplated. Thus, furniture stored in a garret, because there was no room for it in other parts of the house, although not used in the garret, but which is intended for use as needed, is covered by a policy on "household furniture." *Clarke v. Fireman's Ins. Co., 18 La. 431.* A policy upon "all goods placed or to be placed in the building for seven years," covers all goods placed there before as well as after the date of the policy. *New York Gas Light Co. v. Mechanics F. Ins. Co., 2 Hall (N. Y.), 108.* And such a policy is not confined to the identical property on hand when the policy issued, but to articles of the same class on hand at the time of the loss. *Crombie v. Portsmouth F. Ins. Co., 26 N. H. 389.* This is necessarily the case with policies upon stock in trade, furniture, and other shifting risks. The policy does not cover specific articles, but property of a certain class, to the amount insured. A policy upon real estate does not cover personalty, and a policy on personal property does not cover realty; consequently, a policy upon a "woollen mill" will not cover movable machinery, nor, upon the other hand, will a policy upon personal property cover anything which is affixed to the realty.

A policy upon "merchandise," without specifying the class, covers all articles kept solely for the assured, including books, stationery, furniture, and all species of goods in which the assured deals, whether incident to any particular class of merchandise or not. *Siter v. Morris, 13 Penn. St. 218.* But in *Kent v. London, &c. Ins. Co., 26 Md. 294,* the term "merchandise," in a policy on "grain and other merchandise" in each of two warehouses, which were kept by the assured, who were grain merchants, for the purpose of receiving and storing grain, was held not to include a platform scale bedded in the floor of one of the warehouses, or beltings, or a corn-sheller, or a beam-scale, which had been dispensed with in the business, but which had not been offered for sale, or tools, implements, or articles of property purchased for use in the warehouses, as being necessary or convenient for carrying on the business, and which were used as occasion required. But a policy upon property "kept" in a certain building covers property kept for use as well as for sale, but a policy upon "merchandise" covers only property kept for sale, and not that which is kept for use. *Burgess v. Alliance Ins. Co., 10 Allen (Mass.), 221.* A policy which covers "the stock of the assured or held by him in trust," covers stock intrusted to the assured for the purpose of being manufactured: *Stilwell v. Staples, 19 N. Y. 401;* or goods held by him in

pawn, *Rafael v. Nashville Ins. Co.*, 7 La. An. 244. A policy upon a "jeweller's stock in trade" does not cover blankets purchased by the assured with the consent of the insurer to protect the store from a fire burning in an adjoining building. *Willes v. Boston Ins. Co.*, 6 Pick. (Mass.) 182.

Where certain classes of property are incident to the business insured, yet if the policy specifically designates the kind or class of property insured, all other classes are excluded. Thus a policy upon "a stock of hair, wrought and unwrought, raw and in process, as a retail store," was held not to cover fancy goods *made of other material*, although they were such as are usually kept in a retail hair store. *Medina v. Builders' Ins. Co.*, 120 Mass. 225. The specific designation of the property insured excludes all idea that the usages of the trade were intended to control the policy so as to import into it risks not designated. *Joel v. Harvey*, 5 W. R. 488. In *Rafael v. Nashville, &c. Ins. Co.*, 7 La. An. 244, the policy covered "jewelry and clothing, being stock in trade," and it was held that, as the species of stock in trade was designated, the policy could not be extended to cover other classes of property, *although usually forming a part of a jeweller's stock in trade*.

A policy on a "stain saw mill" covers not only the building, but also all the fixtures and machinery therein, which are a part of the mill and would pass by a conveyance of the mill. *Bigler v. New York Central Ins. Co.*, 20 Barb. (N. Y.) 635.

A policy on a "ship on the stocks" only covers such materials as are incorporated into the ship in whole or in part, and does not extend to materials lying in the vicinity, although fitted and intended for use therein. *Hood v. Manhattan Ins. Co.*, 11 N. Y. 532. Nor does a policy upon an unfinished building cover materials prepared for use in its construction, but not in any manner affixed thereto: *Ellmaker v. Franklin Ins. Co.*, 5 Penn. St. 183; because, until connected with the building, such timber remains material, and cannot be said in any sense to be a part of the building. *Mason v. Franklin F. Ins. Co.*, 12 G. & J. (Md.) 468.

NOTE 69. **Warranties.**—Any representation of the assured in his application for insurance relative to the situation, use, care, or character of the property to be insured, as well as in reference to his interest therein, is a warranty that the property is as described, and if false avoids the policy: *Treadway v. Hamilton Ins. Co.*, 29 Conn. 68; whether material or not: *Marshall v. Columbian Ins. Co.*, 27 N. H. 157; *First National Bank v. Ins. Co.*, 50 N. Y. 47; *Brown v. People's Ins. Co.*, 11 Cush. (Mass.) 280; *Boesche v. St. Louis, &c. Ins. Co.*, 31 Mo. 555; *Kelsey v. Universal Ins. Co.*, 35 Conn. 225; *Le Roy v. Market Ins. Co.*, 39 N. Y. 91; *Ripley v. Ætna Ins. Co.*, 30 id. 136; *Garcelon v. Hampden Ins. Co.*, 50 Me. 580; *Gehagan v. Union, &c. Ins. Co.*, 43 N. H. 176; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.), 569; *Tibbetts v. Hamilton, &c.*

Ins. Co., 1 id. 305; *Bartholomew v. Merchants', &c. Ins. Co.*, 43 Barb. (N. Y.) 479; *State, &c. Ins. Co. v. Arthur*, 30 Penn. St. 315. Unless the falsity of the warranty was known to the insurer or its agent when the contract was made, in which case he cannot avail himself of the falsity of the warranty as a defence. *Lycoming Ins. Co. v. Stockblower*, 26 Penn. St. 199; *Viall v. Genessee, &c. Ins. Co.*, 19 Barb. (N. Y.) 440; *Keenan v. Missouri, &c. Ins. Co.*, 12 Iowa, 126; *Sherman v. Madison, &c. Ins. Co.*, 39 Wis. 104; *Roberts v. Continental Ins. Co.*, 41 Ind. 321; *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268; *Ætna Ins. Co. v. Olmstead*, 21 Mich. 246; *Mershon v. National Ins. Co.*, 34 Iowa, 87; *Frost v. Saratoga Ins. Co.*, 5 Den. (N. Y.) 154; *Guardian Life Ins. Co. v. Hogan*, 80 Ill. 35; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Rockford v. Nelson*, 65 Ill. 415; *Miller v. Mut., &c. Ins. Co.*, 31 Iowa, 216; *Eames v. Home Ins. Co.*, 94 U. S. 384; *Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Howard, &c. Ins. Co. v. Connick*, 24 id. 455; *Ayres v. Hartford Ins. Co.*, 21 Iowa, 185; *Atlantic Ins. Co. v. Wright*, 22 Ill. 213; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Campbell v. Merchants' Ins. Co.* 37 N. H. 333; *Cumberland, &c. Ins. Co. v. Schell*, 29 Penn. St. 31; *People's Ins. Co. v. Spencer*, 53 id. 353; *Franklin v. Atlantic Ins. Co.*, 42 Mo. 456; *Roth v. City Ins. Co.*, 6 McLean (U. S. C.C.), 324; *Patten v. Merchants' Ins. Co.*, 40 N. H. 374.

But a representation as to the condition of the property only relates to its present condition, and cannot be construed as a warranty that it shall remain in that condition throughout the life of the policy. *Catlin v. Springfield Ins. Co.*, 1 Sumn. (U. S.) 434; *O'Niel v. Buffalo Ins. Co.*, 3 N. Y. 122; *Frisbie v. Fayette Ins. Co.*, 27 Penn. St. 325; *Schmidt v. Peoria, &c. Ins. Co.*, 41 Ill. 295; *Williams v. N. E. Mut. Ins. Co.*, 31 Me. 219; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Cumberland, &c. Ins. Co. v. Douglass*, 58 Penn. St. 419.

Warranties are either affirmative or promissory. An affirmative warranty is one whereby the insured undertakes for the truth of some positive allegation; while a promissory warranty is one whereby the assured undertakes to perform some executory stipulation. In other words, one relates to the present condition of the risk, while the other relates to something which the assured promises shall exist relative to the risk in the future. *O'Niel v. Buffalo Ins. Co.*, *ante*. A promissory warranty is in the nature of a condition subsequent, a failure to perform which works a forfeiture of the rights of the assured under the policy. *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136.

All warranties must be embraced in the policy, or in some paper which is made a part of the policy, either by reference thereto: *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; *Simreal v. Dubuque Ins. Co.*, 18 Iowa, 319; or in such terms as at least warrant an inference that such document is adopted as a part of the contract. *Wall v. Howard Ins. Co.*, 14 Barb.

(N. Y.) 338; *Farmers' Ins. Co. v. Snyder*, 16 Wend. (N. Y.) 48; *Jefferson Ins. Co. v. Catheal*, 7 id. 72; *Delonguemere v. Tradesman's Ins. Co.*, 2 Hall (N. Y.), 589; *Com. Ins. Co. v. Moninger*, 18 Ind. 352; *Denny v. Conway F. Ins. Co.*, 13 Gray (Mass.), 492; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *Jennings v. Chenango Ins. Co.*, 2 Den. (N. Y.) 75; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 389; *Gates v. Madison Ins. Co.*, 5 N. Y. 469; *Burritt v. Saratoga Co. Mut. Ins. Co.*, 5 Hill (N. Y.), 188; *Allen v. Hudson River Ins. Co.*, 19 Barb. (N. Y.) 442; *N. Y. Cent. Ins. Co. v. National Protection Ins. Co.*, 20 id. 468; *Lexton v. Montgomery Ins. Co.*, 9 id. 191; *Jube v. Brooklyn, &c. Ins. Co.*, 28 id. 412; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Chaffer v. Cattaraugus Ins. Co.*, 18 N. Y. 376; *Eagan v. Ins. Co.*, 2 Den. (N. Y.) 326; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632; *Wood v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Emerson v. Murray*, 4 N. H. 171; *Sayles v. N. W. Ins. Co.*, 2 Curtis (U. S.), 610. Or which is annexed to the policy. *Murdock v. Chenango, &c. Ins. Co.*, 2 N. Y. 210; *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488; *Emerson v. Murray*, 4 N. H. 171; *Stocking v. Fairchild*, 5 Pick. (Mass.) 181; *Roberts v. Chenango Ins. Co.*, 3 Hill (N. Y.), 501.

As previously stated, an affirmative warranty is one which relates to the present condition of the risk, *and if true when made*, the policy is not defeated because the condition does not exist throughout the life of the policy. Thus a description of a frame house in a policy as "filled in with brick" avoids the policy, unless the house was in fact filled in with brick when the policy was made. *Fowler v. Aetna Ins. Co.*, 6 Cow. (N. Y.) 673. So where the house is described as being occupied by a certain person, as tenant, the warranty is met if such person occupied the building as tenant, at that time, although he moved from the premises soon after. *Gates v. Madison Mut. Ins. Co.*, 5 N. Y. 469; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *O'Niel v. Buffalo Ins. Co.*, 3 N. Y. 122; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 435. But where from the language used, or the nature of the risk, it was evidently the intention of the parties that the state of things described should continue during the life of the policy, the warranty is promissory, and in the nature of a condition subsequent, and if the state of the risk in that respect is changed, the policy is thereby avoided. *First National Bank v. Ins. Co.*, 50 N. Y. 48; *Percival v. Maine Ins. Co.*, 33 Me. 242; *Harvey v. Am. Ins. Co.*, 2 Duer (N. Y.), 554; *Sayles v. N. W. Ins. Co.*, 2 Curtis (U. S.), 610; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *N. Y. Belting Co. v. Ins. Co.*, 10 Bosw. (N. Y.) 428; *Gloucester Manuf. Co. v. Howard Ins. Co.*, 5 Gray (Mass.), 497; *Crocker v. People's Ins. Co.*, 8 Cush. (Mass.) 79; *Lee v. Howard Ins. Co.*, 3 Gray (Mass.), 582.

Where the assured, expressly or by fair implication, promises to do a specific act in reference to the risk, a failure to do it will avoid the policy,

and if it relates to some change in the building, or its use, and no time is named in which it shall be done, he will be required to do it in a *reasonable* time; and as to what is a reasonable time, is a question for the jury in reference to the materiality of the change, its character, and the evident expectation of the parties from the circumstances existing at the time when the application was made. Thus, where the insured in his application, which was made a part of the policy, stated that there was one stove in the building, and that the pipe passed through the window, but that a stove chimney would be built and the pipe pass into it at the side; it was held that this amounted to a warranty that a chimney should be built *within a reasonable time*, a violation of which would avoid the policy. And where, after the insurance, no chimney was built, but the stove was removed to another part of the building, and the pipe passed through a stone fixed in the roof, and the secretary of the company indorsed upon the policy, "consent is given that the within policy remain good notwithstanding the stove has been removed;" it was held that this did not waive compliance with the terms of the warranty. *Murdock v. Chenango, &c. Ins. Co.*, 2 N. Y. 210.

No particular form of words is necessary; it is enough if the language is such, as applied to the risk, as to indicate that it was the intention of the parties that a certain thing should be done, or a certain state of things continue. *Stout v. City F. Ins. Co.*, 12 Iowa, 371; *Jennings v. Chenango Ins. Co.*, 2 Den. (N. Y.) 75; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Bomadiah v. Hunter*, 5 M. & G. 639; *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Sayles v. N. W. Ins. Co.*, 2 Curtis (U. S.), 610. And the language must be such as to leave no doubt that a continuing warranty was intended; as in case of doubt, it will be treated either as a mere representation or as a warranty *in presenti*. *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; *Lindsey v. Union Ins. Co.*, 3 R. I. 157; *Delonguemere v. Tradesman's Ins. Co.*, 2 Hall (N. Y.), 489; *Frisbie v. Fayette Ins. Co.*, 27 Penn. St. 325; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 483; *Garcelon v. Hampton F. Ins. Co.*, 50 Me. 580; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 367. *In no case will the courts extend the warranty beyond its apparent scope.* Nothing will be implied, but the rights of the parties will be determined by the language. A warranty will neither be extended or created by construction; it must clearly appear either in express terms or as a *necessary* result from the nature of the contract. *Jefferson Ins. Co. v. Cotheal, ante*. The rule is, that *representations in a policy are construed to be warranties when it is apparent that they had in themselves, or in the view of the parties, a tendency to induce the company to enter into the contract on terms more advantageous to the insured than without them.* *Frisbie v. Fayette Ins. Co., ante*. The contract must embrace everything relied upon by the assured, and nothing can be imported into it by parol. There can be no warranty

except as to matters *stated and written or printed in the contract*, but representations may be either in writing or by parol. If, however, written representations are made, parol representations are excluded, the writing is presumed to embrace all that were made, or that were required by the insurer, but, if no written application exists and parol representations were made, in reliance upon which the policy was issued, they may be proved. *Boardman v. N. H. Mut. F. Ins. Co.*, 20 N. H. 551; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Lycoming Ins. Co. v. Mitchell*, 48 Penn. St. 367; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Nicoll v. American Ins. Co.*, 5 W. & M. (U. S. C. C.) 529; *Snyder v. Farmers' Ins. Co.*, 13 Wend. (N. Y.) 92. See *Wainwright v. Bland*, 1 M. & W. 32.

Warranties are to be construed according to the evident intent of the parties in view of the language used, the subject-matter to which they relate, and the matters usual or incident thereto. Impossible matters are not within their provisions, neither are unusual matters, where a fixed and definite usage exists, nor unlawful acts, unless the stipulation is specific, and imposes an absolute duty upon the assured which excludes the idea that the warranty is limited in any of these respects. See very able opinion of LEARNED, P. J., in *Whitney v. Black River Ins. Co.*, 9 Hun (N. Y.), 26, as to effect of the character of the risk upon the construction of the policy. *Aurora F. Ins. Co. v. Eddy*, 50 Ill. 106.

When the policy provides that a watchman shall be kept nights, it is construed as binding the assured to keep a watchman on the premises every night, until the usual hours for resuming work in the morning. *Crocker v. People's Ins. Co.*, 8 Cush. (Mass.) 79; 3 Bennett's F. I. C. 231; *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 3 Bennett's F. I. C. 213. But unless the language is specific, and requires the watchman to be kept *constantly* on the premises, the question as to whether the warranty has been broken by a temporary absence of the watchman from the premises, is for the jury, and, as bearing upon the question, the usage of other similar establishments in this respect is admissible. *Crocker v. People's Ins. Co.*, *ante*. The policy contained this clause, "a machine shop; a watchman kept on the premises." There was no watchman at the time of the fire, and there had been none for some ten days prior to the fire. *May v. Buckeye Ins. Co.*, 25 Wis. 291. But see *Glendale Woolen Co. v. Protection Ins. Co.*, *ante*, for instances where evidence of usage will not be permitted; but in order to make evidence of a usage in this respect admissible, it must either be so general that the courts will presume that the insurer had notice of its existence, or it must be shown that he in fact had knowledge thereof, so that it will be presumed that the parties contracted in reference to it. "For this purpose," said MULLEN, J. in *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 3 Bennett's F. I. C. 223, "the custom must be established, and not casual, — uniform, and not varying, — general, and not personal, and known to the parties."

The court fell into an error, which resulted from the wrong use of terms. There is a wide distinction between a usage and a custom. Long usage makes custom; but it is not every usage that amounts to a custom, but only such usages as have become so fixed and permanent in connection with a particular business as to have become an incident thereof *and a law thereunto*. When a usage has ripened into a custom, no proof except of the existence of the custom is necessary, because the law presumes all persons to be aware of it; but a usage simply must not only be shown to exist, but also it must be shown that the parties *knew* of its existence. At common law, custom is *immemorial usage*, — *usage so long continued that its origin cannot be discovered*. If its inception can be shown, upon the ground that the person by whose particular will it was originated is thereby ascertained, it cannot be treated as a custom, *because a custom, being a law, cannot have its origin in the impotent act of any particular individual, but in the will of the whole*. *Simpson v. Wells*, L. R. 7 Q. B. 214; *Rex v. Joliffe*, 2 B. & C. 54; *Master, Pilots, &c. v. Bradley*, 2 E. & B. 428 *n*. Thus a distinction of a very important and decisive character exists between a usage and a custom, and this distinction must not be lost sight of in the construction of policies of insurance, even though the courts, by confusing terms, sometimes seem to fail to observe the distinction. When a custom is shown, *it is as much a part of a contract to which it relates as a statute is, because it is a part of the law pertaining to those matters*, and, unless specially excepted against in the contract, will control its interpretation.

Where the warranty is "a watch kept," the assured is treated as contracting to keep a *suitable* watch, and it is for the jury to say whether or not there has been substantial compliance with the warranty; and in determining that fact it is competent to show that such a watch was kept as is usually kept in similar establishments. *Crocker v. People's Mut. Ins. Co.*, *ante*. In *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.), 30, in a policy upon a saw-mill, the assured covenanted "that a representation given in the application for this insurance contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null." The applicant, to a question, "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work; watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to, and habitually did, examine the mill with ref-

erence to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. It was held, that the term "good watch" must be interpreted to mean "suitable" or "proper watch;" and that it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for. If the warranty is to keep a watch "at all times when the business is not in operation," a temporary absence of the watchman during such periods avoids the policy, even though the watchman is prevented by officers of the law from discharging his duties. In *First National Bank of Ballston v. Ins. Co. of N. America*, 50 N. Y. 45, it appeared that in a survey which was made, referred to, and made a part of a policy upon a paper-mill, this inquiry was made: "Watchman, — Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation, or when the workmen are not present?" Answer: "Yes." On the day previous to the destruction of the property by fire, the personal property in the mill was levied upon by the sheriff, by virtue of an execution against the assured. The sheriff excluded the employees from the mill, took the keys, and locked up the building. The deputy sheriff and one of the trustees of the assured remained in the office of the mill, about two rods from it, during the night, up to the time of the discovery of the fire, which occurred about 4 A. M.; but they did not keep watch. In an action upon the policy, it was held, that the question and answer in the survey constituted a warranty; that the levy did not excuse from the obligation to perform it; that the deputy and trustee were not to be regarded as watchmen within the meaning of the policy; and that, there being a breach of the warranty, plaintiff was properly nonsuited. GROVER, J., saying, "Failure to comply with a warranty will bar a recovery, in case of loss, whether the loss was caused by such failure or not. Cases, *ante*. In the present case the survey is made part of the policy. In the survey the following inquiry is made: 'Watchman: Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation, or when the workmen are not present?' Answer. 'Yes.' This statement was promissory, but the rights and duties of the parties were the same under it as though it had been affirmative. *Ripley v. The Ætna Ins. Co.*, *ante*. The proof was that upon the day previous to the destruction of the property by fire, the sheriff levied an execution against the assured upon the personal property in the mill, and excluded their employees therefrom, took the keys, and locked up the mill. The counsel for the appellant insists that this act of the sheriff, being an act that it was his legal duty to perform, must be regarded as the act of law, and cites authorities showing that when performance of a contract becomes impossible by the act of God or the law, performance will be excused. The answer to this in the present case is that it was the default of the assured in not paying the judgment that caused the issuing and levy of

the execution. The levy does not therefore excuse it from the obligation to perform the warranty. The counsel further insists, that as the deputy-sheriff and one of the trustees remained in the office of the company, a building about two rods from the mill, during the night and until the discovery of the fire, they should be regarded as watchmen within the meaning of the policy. But the testimony failed to show that they were such, or even so regarded themselves. That shows that they looked through the building twice in the evening, the last time about eleven o'clock, and then went into the office, lay down, and dozed until about four o'clock, when the deputy-sheriff turned over and discovered the mill in flames, the fire being so extensive as to render all attempts to save the building and property hopeless. It is clear that these persons never undertook with the assured to act as watchmen, and consequently incurred no liability to it for negligence in the performance of the duties of such employment. In case of a recovery in the action, the defendant would have no right by subrogation to any remedy against them on that ground. This shows that they were not watchmen within the meaning of the term." And a warranty to keep "a watchman, nights" includes Sunday nights, even though by statute labor upon that day is prohibited. *Glendale Woolen Co. v. Protection Ins. Co.*, *ante*; *Ripley v. Ætna Ins. Co.*, *ante*. But see *May v. Buckeye Ins. Co.*, 25 Wis. 291, where it is held that the law will not presume that the parties contemplated an *unlawful* act. The question as to whether the warranty has been complied with is exclusively for the jury. *Crocker v. People's Ins. Co.*, *ante*; *Hovey v. American Ins. Co.*, 2 Duer (N. Y.), 554; *Sheldon v. Hartford Ins. Co.*, 22 Conn. 553; 3 Ben. F. I. C., 551; *Houghton v. Ins. Co.*, 8 Met. (Mass.) 114.

When a policy requires a watchman to be kept on the premises, the insured is not required to keep one there constantly, but only at such times and during such periods as men of ordinary care and skill in such business employ one, and in this respect the usage of similar establishments is admissible. In *Crocker v. The People's Mut. F. Ins. Co.*, 8 Cush. (Mass.) 79, the plaintiff procured insurance upon his machine-shop, and the policy contained a provision as follows: "Machine shop, watchman to be kept on premises." The plaintiff employed a watchman on the 14th of November to watch one fourth of the night, leaving the shop about half past seven in the evening. On the 28th of November the watchman was hired for one half the night, leaving the shop at half past ten in the evening, and on December 28, at about one o'clock in the morning, a fire broke out and the building was destroyed. The defendant resisted payment upon the ground that plaintiff had broken this condition of the policy. The plaintiff was permitted to show the usage in this respect by different similar establishments. The court charged the jury that, under this condition of the policy, "some watchman must have been kept on the premises in order to comply with this clause. It must not

have been a pretence merely, or only a colorable keeping of a watchman. *But if in good faith, and without fraud, a watchman was kept upon the premises, and such a watchman, and for such a portion of the time or at such specified hours as, in the exercise of ordinary care and prudence, was deemed sufficient for the safety of the building, that would be a compliance with the provision of the policy, and that, in order to determine whether or not a watchman was kept on the premises in good faith and in the exercise of ordinary care and prudence, the jury might refer to the evidence in the case as to what was common and usual in regard to keeping watchmen in other similar establishments;*" and upon appeal this ruling was sustained. "What is common and usual," said SHAW, C. J., "under given circumstances is evidence tending to show what is reasonable."

In all cases when a strict and literal compliance with the terms of a warranty is known to be impossible, it is presumed that a substantial compliance therewith was intended, and if there is a substantial compliance, the warranty is met, as when the policy requires to be kept in the building, the requirement must be substantially complied with. Thus, where the policy stipulated that the "insured is to keep eight buckets filled with water on the first floor, where the machinery is run, and four in the basement by the reservoir, ready for use at all times," it was held that this stipulation was to be construed reasonably, *and in view of natural or unavoidable causes—such as freezing weather—and that, while a literal compliance might not be possible, yet the assured must show that he kept the buckets at all times, as required by the policy, in a good and serviceable condition at the places designated, ready for instant use.* *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Garrett v. Provincial Ins. Co.*, 20 Upper Canada, Q. B. 200. So a warranty in this respect is to be construed according to the intent and evident understanding of the parties, as applied to the condition of the risk, its uses, and purposes.

The same rule applies where the assured, by the terms of the policy, is required to have a force pump or other appliances for extinguishing fires upon the premises. In such cases, the warranty is construed as requiring him to have the appliances there in condition for use at all times; but even though the warranty is in express terms that the pump shall be "at all times ready for use," yet, if it is ready for use when the fire occurs, the fact that it becomes disabled *during the fire* does not operate as a breach. *Sayles v. N. W. Ins. Co.*, 2 Curtis (U. S.), 610. Such a warranty will be reasonably construed, and will not be extended beyond its terms. But as a force pump would be useless without power to operate it, it will be construed to include such power, but not to include any particular power. But even this depends upon extrinsic matters, and will be construed in reference to the subject-matter of the risk. This was well illustrated by CURTIS, J., in the case last cited. He said: "If this warranty were of a force pump in a *dwelling house* at all times ready

for use, I should hold it satisfied by the existence of a force pump in a condition to be worked, . . . considering the nature of the works, and the uniform and notorious usage to have such a pump in such a position *driven by power.*" A warranty of this kind, however, is held not to require the assured to have hose for use in connection with the pump. *Peoria, &c. Ins. v. Lewis*, 18 Ill. 553 ; mem. of Case in 4 Bennett's F. I. C. 187.

This was well illustrated in a Massachusetts case, *Gloucester Manuf. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497. In that case the policy contained this stipulation, "water-tanks to be well supplied with water at all times." An indorsement upon the policy converted it into an insurance upon buildings "in course of construction," and the court held that the warranty in reference to the water-tanks and water was to be construed in reference to the condition of the risk, and that, while the buildings were in the course of construction, the assured was not required to have them supplied with water in the same manner and to the same extent that would be required in the case of finished buildings.

NOTE 70. Increase of Risk. — Where a policy provides that "if the premises shall be changed, whereby the risk is increased" during the life of the policy without the assent of the insurer, the policy shall be void, a change *materially increasing the risk* must be made, in order to invalidate the policy. In other words, the change must be essential and material, and such as was not contemplated by the parties, and it must enhance the risk, and the burden of establishing such increase of risk is upon the insurer. Thus in *Jones Manuf. Co. v. Mut. Ins. Co.*, 8 Cush. (Mass.) 83, the policy provided that if the situation or circumstances affecting the risk should be so altered or changed by the insured without the consent of the insurer as to increase the risk, the policy should be void. After the policy was issued, the assured changed the location of the stove and its smoke-pipe, without the assent of the insurer, so that the smoke-pipe, instead of passing into the chimney in that story, was carried up through the floors of the second and third stories, and after passing around the third story about two feet from the floor for the purpose of drying wool, entered the chimney in that story. The judge instructed the jury that such alteration and use of the pipe in the third story would not invalidate the policy, unless the change increased the risk from fire in that story; and the ruling was sustained on appeal. In *Wood v. Hartford F. Ins. Co.*, 13 Conn. 533, the building was insured as a paper-mill. The rag-cutter and duster were taken out, and a pair of stones for grinding grain were substituted in their place. *Held*, that the policy was not *per se* avoided by such change, nor at all *unless* the risk was materially increased thereby. See also *Manley v. Ins. of North America*, 1 Lans. (N. Y.) 20. The putting up of an additional stove in the building was held of itself not to invalidate the policy. The court held that the insurer must, in order to avoid liability, show *that the risk was increased thereby*. Newhall

v. Union, &c. Ins. Co., 52 Me. 180. In *Stokes v. Cox*, 4 H. & N. 445, the policy covered "buildings, part of the lower story used as a stable, coach-house, and boiler-house, no steam-engine employed on the premises, the steam from said boiler being used for heating water and warming the shops. Melting tallow by steam in said boiler-house, and the use of two pipe stoves in said building are allowed. Warranted that no oil be boiled, nor any process of japanning leather be carried on therein, nor in any building adjoining thereto." Stipulated: "If, after the insurance shall have been effected, the risk shall be increased by any alteration of circumstances, and the same shall not be endorsed on the policy by an agent of the company, and a higher premium paid, if required, such insurance shall be of no force." It was a special risk. After the policy was effected, a steam-engine was put up into the stable, supplied with steam from a boiler insured by the policy, of which insurers had not any notice; but the jury found specially that the risk was not increased. It was held that the insured was not bound to give notice of the alteration unless the risk was increased; that as it was found that no increase of risk had occurred, the plaintiffs were entitled to judgment. In *Appleby v. Astor Fire Ins. Co.*, 54 N. Y. 253, the respondents occupied a part of the premises for storage purposes, under a lease containing a provision against the use of the building for extra-hazardous purposes. A part of the premises were subsequently leased for the purpose of finishing chairs, for which various inflammable substances were used, and the fire was occasioned by the use of an alcohol lamp in this business. It was held that, in the first class of hazards no process of manufacture or completion of any article was contemplated, and that it had reference to articles in a finished state, also, that there was an important difference between the risk of insuring against fire any article completed and finished and the same article undergoing the process of completion.

When the policy stipulates against the use of the premises for certain purposes, as where a list of uses regarded as hazardous, extra-hazardous, or specially hazardous, is annexed to the policy, unless the use for which the premises are insured, or the description of the risk, imports a license to use the premises for certain purposes named as hazardous, &c., the use of the premises for any of such purposes, or the keeping of any such hazardous, &c., articles *per se* avoids the policy; and the only question is *whether the premises were used for such prohibited purposes, or such prohibited articles were kept*, and if so, the policy is invalidated without any reference to the question whether the risk was thereby increased or not. *The insurer has made it material by the prohibition*, and his action in that respect is conclusive. *Hervey v. Mutual F. Ins. Co.*, 11 U. C. (C. P.) 394; *Harris v. Columbian Ins. Co.*, 4 Ohio, 285; *Appleby v. Firemen's Ins. Co.*, 45 Barb. (N. Y.) 454; *Appleby v. Astor Ins. Co.*, 54 N. Y. 253; *Washington F. Ins. Co. v. Davison*, 30 Md. 91; *Merchants', &c. Ins. Co. v. Washington, &c. Ins. Co.*, 1 Handy (Ohio), 181. If the keeping of in-

flammable materials is prohibited, the keeping of such substances by a tenant avoids the policy. *Liverpool, &c. Ins. Co. v. Gunther*, 116 U. S. 113; *Long v. Becker*, 106 Penn. St. 466. See *Merrill v. Ins. Co.*, 23 Fed. Rep. 245. The keeping of dynamite is prohibited under a clause prohibiting the keeping of nitro-glycerine. *Sperry v. Springfield, &c. Ins. Co.*, 26 Fed. Rep. 234. But keeping "fire works" is not prohibited under a clause prohibiting gunpowder. *Tischler v. California, &c. Ins. Co.*, 68 Cal. 178. And the fact that the loss did not result from such change of risk is of no consequence. The change having been made contrary to the prohibition of the policy is fatal to a recovery for a loss, from whatever cause occurring. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Jones v. Manufacturers' Ins. Co.*, 8 Cush. (Mass.) 82; *Stetson v. Ins. Co.*, 4 Mass. 330; *Clark v. Manufacturers' Ins. Co.*, 2 W. & M. (U. S. C. C.) 472; *Allen v. Ins. Co.*, 2 Md. 111; *Farmers', &c. Ins. Co. v. Simmons*, 30 Penn. St. 299; *Lee v. Howard Ins. Co.*, 3 Gray (Mass.), 583; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Perry, &c. Ins. Co. v. Stewart*, 19 Penn. St. 45; *Howell v. Baltimore, &c. Ins. Co.*, 16 Md. 377; *Merriam v. Middlesex, &c. Ins. Co.*, 21 Pick. (Mass.) 162; *New York v. Exchange Ins. Co.*, 9 Bos. (N. Y.) 424; *Sandford v. Mechanics' Ins. Co.*, 12 Cush. (Mass.) 541; *Fabyan v. Ins. Co.*, 33 N. H. 203; *Bowman v. Pacific Ins. Co.*, 27 Mo. 152; *Rice v. Tower*, 1 Gray (Mass.), 426; *Davern v. Merchants' Ins. Co.*, 7 La. An. 35; *English v. Franklin Ins. Co.*, 55 Mich. 273.

The question as to whether there is an increase of risk is one of fact for the jury. *Robinson v. Mercer Ins. Co.*, 27 N. J. L. 134; *Jones v. Fireman's Fund Ins. Co.*, 51 N. Y. 318; *Williams v. People's Ins. Co.*, 57 N. Y. 274. In *Martin v. State Ins. Co.*, 42 N. J. L. 485, the premises were described as being "occupied as a boarding-house," and subsequently a part of the building was occupied as a bar and billiard-room. Such occupancy, not being prohibited, and not being shown to have increased the risk, was held not to avoid the policy. *Dixon, J.*, said :—

"The contract stated the insurance to be upon the plaintiff's 'two-story and attic frame, shingle-roof building, occupied as a boarding-house, situate, &c., known as the 'Mansion House,'' and declared that if an application, survey, plan, or description of the property insured was referred to in the policy, such application, survey, plan, or description should be considered a part of the contract and a warranty by the assured; and [in case of] any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any misrepresentation whatever, either in a written application or otherwise, or if the premises should be occupied or used so as to increase the risk, then the policy should be void.

"The evidence showed that the premises were let to a tenant whose principal business was keeping boarders there, who had in it also a billiard-room and a bar where liquors were unlawfully retailed without

license. The house was styled by the witnesses a boarding-house, a summer boarding-house, a hotel, a tavern, and a roadside inn ; and in his proofs of loss, the plaintiff stated that it was occupied as a 'boarding-house and country tavern,' and as a 'hotel.'

" The policy referred to no application, plan, survey, or description outside of itself. There was no testimony offered to show that the sale of liquors or the keeping of a billiard-table increased the risk beyond that of a mere boarding-house; and when the plaintiff offered to prove that he had fully made known to the company the uses to which the property was put, the defendant objected and the trial judge prevented him. It is conceded that the condition and situation of the building are accurately described. And therefore the only remaining inquiry under these clauses of the policy is, whether the contract was avoided by any false representation as to the occupancy of the premises, or by any misrepresentation whatever.

" Since it is not claimed that there was any representation to come under the ban of these provisions, except the one upon the face of the policy, that the building was occupied as a boarding-house, I do not perceive how in this case they strengthen the position of the company, for that representation concerning the use of the property became by its insertion in the policy a warranty that the property was so used, and if false, annulled the contract, even without the recited clauses. *Dewees v. Manhattan Ins. Co.*, 37 N. J. L. 366; *American Life Ins. Co. v. Day*, 10 id. 89; *Franklin Ins. Co. v. Martin*, 11 id. 568; 29 Am. Rep. 271.

" The question then is, Was this representation as to occupancy false? It seems to me that it was not, or at least that it was not so clearly false as to make the verdict of the jury in favor of its truth a legal wrong to the defendant. The terms 'hotel,' 'tavern,' 'inn,' which the defendant says should have been used, are properly applied to places kept for the entertainment of travellers and casual guests, and (in view of our license laws) where liquors may be legally retailed and drunk. Neither of these characteristics pertained to the house in question as a distinguishing feature. This house was kept mainly for the residence of permanent boarders, and so far as the evidence disclosed, it afforded no entertainment to travellers or transient customers except such as was unlawfully dispensed over the bar. The bar and the billiard-room were not inconsistent with its being a boarding-house, and while their existence may have rendered the description that it was occupied as a boarding-house incomplete, it did not necessarily make the description false. A partial statement, in itself true, may indeed be a false description, but that can be only when the main characteristics are thrown into the background and concealed behind some unimportant feature. In the present case, the description brought prominently forward the chief use for which the house was occupied, and even if that description did not suggest the uses to which two of the rooms were put, it should not therefore be considered

false, but only as imperfect. But to render an imperfect description fatal, clear language to that effect must be found in the contract. For almost any description brief enough to be inserted in a policy would be more or less imperfect, and it could not be reasonably supposed that the parties contracted on the opposite notion. Certainly the court should not adjudge a forfeiture on any such theory. Suppose a building were stated to be used as a banking-house, when, besides, the janitor and his family resided in the basement, or to be occupied as a dwelling, when in fact the tenant had one room for his dental office, or his shoemaker's shop, could the policy be repudiated? Such a result would seem to be not fairly within the contemplation of the parties. Perhaps if the mode of use of a building were made the subject of special inquiries, to be answered in an application which was to become part of the contract as a warranty, it might with more reason be concluded that every species of use was to be disclosed; or if the policy expressly interdicted occupation for certain purposes, a general statement as to occupancy which did not mention them, might properly be regarded as excluding their presence; but when the statement appears only in a description of the building, which to a general reader would seem designed merely to identify the subject of the insurance, it should be sufficient if the statement be literally true, and not so imperfect as to be likely to convey a false impression to a common understanding.

"In *Wall v. East River Ins. Co.*, 7 N. Y. 370, the policy insured the stock of rope manufacturers in a building occupied as a store-house, and expressly forbade the use of the building for carrying on certain trades denominated hazardous, among which was the business of rope-makers. The third story of the building was used for hackling the hemp and the second for spinning it into rope yarns, and only the first story and basement for storing hemp. Here was not only an interdicted use, but a description that applied to not more than half the building. The policy was held void. Of the same class is *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. 479, where the insurance was on a 'two-story frame dwelling-house.' The top story was a billiard-room, part of the lower story was a billiard-room, part was an eating-saloon, and the residue a dwelling. Billiard-saloons and eating-houses were prohibited by the policy as extra-hazardous. The court held that the company was discharged.

"So in *Deweese v. Manhattan Ins. Co.*, 37 N. J. L. 366, the premises described as being occupied for a country store were in part occupied as a private stable, which was an expressly forbidden use, as an extra-hazardous risk. *Held*, that during such use the policy was suspended.

"In *Lappin v. Charter Oak Ins. Co.*, 58 Barb. (N. Y.) 325, the property was described as a dwelling-house, and according to the policy, any misrepresentation or omission to state any fact material to the risk would avoid the contract. The referee found as facts that the assured had represented that the building was not used as a tavern or saloon, that in

truth the basement was used as a saloon, and that such use increased the risk. Still the court preferred to hold the company released on some other grounds.

“In *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, the application of the assured described the building as a stone dwelling-house, and by reference to the by-laws, provided that unless it contained a true representation of the property, so far as concerned the risk and value, the policy should be void. A wooden kitchen, attached to the stone structure, formed part of the dwelling. *Held*, that the policy was void.

“On the other hand, in *Dobson v. Sotheby*, 1 M. & M. 90, the policy was effected upon ‘a barn.’ The premises were agricultural buildings, but not such as were strictly to be described as a barn. Lord TENTERDEN held the policy good, because it would give the company substantial information of the nature of the buildings, and the rate would have been the same if a more correct phrase had been used. He said the buildings were substantially well described.

“So, in *Foot v. Ætna Ins. Co.*, 61 N. Y. 571, it was said that warranties must be substantially true; and in *Gerhauser v. N. B. & M. Ins. Co.*, 7 Nev. 174, and *Copp v. German Ins. Co.*, 51 Wis. 637, it was held that the breach of warranty must be a substantial one to avoid the policy.

“In *Hall v. People’s Ins. Co.*, 6 Gray (Mass.), 185, the policy described the building as a hotel. It was leased as a hotel and kept by the tenant as such, but he used it also as a house of ill-fame. *Held*, that this alone did not invalidate the contract, but that if the undisclosed use were a material fact known to the insured and suppressed by him, then the policy would not bind. This decision can be supported only on the theory that the warranty on the face of the policy was not broken, if it contained the substantial, although not the complete truth.

“In *White v. Mutual Fire Ass. Co.*, 8 Gray (Mass.), 566, the policy described the property as ‘a brick dwelling-house and wood-house.’ The ‘wood-house’ was built for and used as a wood-house and carriage-house, the wood-room constituting about two-thirds of the whole structure. *Held*, that the policy covered both, and was valid.

“In *Haley v. Dorchester Ins. Co.*, 12 Gray (Mass.), 545, an applicant for insurance on his stock in trade contained in a certain building, replying to a question as to who occupied the building, named the occupants of all except one or two rooms, and his answers were made warranties. *Held*, that unless the occupation of the omitted rooms would increase the hazard, the policy would not be annulled.

“Now in the case before us the building was sixty-five feet front by seventy-five feet deep for two stories, and the attic was fifty feet square, and only a space of twenty-five feet by sixty-five feet on the first story was occupied by the bar and billiard-rooms; the rest of the house was appropriated to boarders, who of course had access also to these two rooms. No testimony was offered to show that a bar and a billiard-table

increased the risk of fire, the policy does not indicate that they are objectionable, no inquiries appear to have been made as to occupancy, and the plaintiff tendered proof that in truth the company was apprised of all the circumstances.

“In view of these facts and the adjudged cases, it does not seem just to hold that the jury were bound to find that the warranty was broken.

“We are therefore of opinion that the rule to show cause should be discharged.”

When a policy provides that “*any change in the risk*” not made known at the time of the renewal of the policy, shall avoid it, changes *material* to the risk are intended, and the question, whether a failure to give notice of a change avoids the renewal, depends upon whether the risk was *increased* by such change. *Parker v. The Arctic F. Ins. Co.*, 59 N. Y. 1. Thus in the case last referred to, the defendants issued a policy to the plaintiffs upon their “brick grist and plaster mill,” containing such a clause. In the fall, after the policy was issued, the plaintiffs erected a steam power contiguous to the mill, in such a manner *as not to increase the risk in any way*. It was held by the court that neglect to give notice of the change *did not avoid the policy*. “If,” said ANDREWS, J., “there was no increase of risk by reason of the annexation of the steam power, *there was no change of risk within the meaning of the policy*, and no notice was required to be given. . . . *If the risk was not increased by changes in the condition of the property, the company had no interest in knowing the fact that they had been made.*” An additional risk is not the same as a material increase of risk, for there may be an *additional*, without a material increase of risk. *Allen v. Mutual F. Ins. Co.*, 2 Md. 111.

Where, however, the risk is increased, and notice is not given, and the insurer does not *know* of the change or increase, notice must be given or the policy is defeated. *Jones v. Manufacturers’ Ins. Co.*; 8 Cush. (Mass.) 82; *Kern v. St. Louis, &c. Ins. Co.*, 40 Mo. 19; *People’s Ins. Co. v. Spencer*, 54 Penn. St. 353; *Bidwell v. N. W. Ins. Co.*, 24 N. Y. 302; *Rawley v. Empire Ins. Co.*, 40 id. 557. Mere casual conversations, in which the change is talked about with the insurer or his agent, do not, of themselves, establish notice or knowledge of the change; knowledge in fact, or notice of the extent of the change, must be shown. Thus, in *Sykes v. Perry Co., &c. Ins. Co.*, 34 Penn. St. 79, the policy provided that “in case of any alteration, &c., to the building insured application must be made to the secretary or any agent, who shall examine the premises, and certify his opinion whether the hazard be thereby increased.” A steam-engine was put up and used in the premises for nearly a year, and for the purpose of showing notice to the company, defendant’s agent testified: “Plaintiff told me when we were fixing the papers, he contemplated putting an engine into the mill. I told him to leave notice with D., and I would come up. Some time after D. saw a boiler passing, and supposing it was going into the mill, told the agent.” Fur-

ther evidence was given to show that other persons had talked with the agent about the boiler. It was held, the evidence was insufficient to establish notice; therefore, insurers were discharged.

Notice of the change or increase must be given, or knowledge thereof by the insurer or his agent, or a waiver of the breach must be established, or the policy is void. In *Howell v. Baltimore Eq. Society*, 16 Md. 377, the policy provided that "when any material alteration or repairs are about to be made in the premises which increase or vary the risk, information shall be given in writing to the office, and permission obtained from the directors to make such alterations or repairs, and, in default thereof, any loss happening by reason of making such repairs shall not be paid or demanded. Any hazardous business, trade, or occupation carried on on the premises, which shall increase the risk, shall in like manner be notified, and permission obtained to carry it on, and, in default thereof, this policy shall be void." It was held that any increase of risk occasioned by an alteration or occupation of the premises avoided the policy. In *Gardiner v. Piscataqua Ins. Co.*, 38 Me. 439, the policy stipulated, "it shall be the duty of insured to give notice to the secretary of any material and manifest increase of the risk which may have happened without his agency or consent, and insurers may agree with insured for such an increase of premium as they deem sufficient to cover such increase of risk, or they may withdraw such insurance altogether; and if insured shall neglect to give notice, or refuse to comply with the decision of the officers of the company, this policy shall from that time be void." A blacksmith-shop was erected on land adjoining the property insured, within ten or twelve feet of its south side, used by the owner. About six or eight months thereafter, the building insured was consumed by fire, originating in it, and the blacksmith-shop was also burned by fire communicated from the stove. About six months thereafter, insurers made an assessment on the policy in suit for losses occurring before the fire. It was held that erecting the blacksmith-shop increased the risk and avoided the policy; making and collecting the assessment did not estop insurer from treating the policy as void, because a confirmation does not strengthen a void estate; when a lease is *ipso facto* void by the condition, no acceptance of rent afterwards can give it countenance. In *Kern v. St. Louis, &c. Ins. Co.*, 40 Mo. 19, the policy provided that "if the risk shall be materially increased, notice shall be given thereof to the insurer immediately, that the rate of insurance may be increased, or the policy cancelled at the option of either party." It was held that if the risk was materially increased, and the insured failed to give notice of it, the policy became absolutely void. In *Harris v. Columbian Ins. Co.*, 4 Ohio St. 285, the policy covered a brick flouring mill, engine house, steam-engine, and machinery thereto belonging. The by-laws were made part of the contract, and they stipulated: "If insured shall alter or enlarge a building, or appropriate it to purposes other than those mentioned in the

policy, so as to increase the risk, the same shall *ipso facto* become void, unless notice thereof shall be given insurer." Insured commenced to make repairs, and continued them for about three months; but they were finished a few weeks before the fire occurred. The third story of the mill had been used, a few weeks prior to the loss, for the manufacture of tubs and churns. It was held that the insurers were released. In such cases every increase, of risk within the control of the assured, not noticed to the insurer avoids the policy. *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337.

The fact that the property is described as of a certain class or as devoted to a certain use, does not amount to a warranty that such use shall continue, but merely as a warranty that the property is devoted to such use at the time the insurance is made. Therefore, unless expressly prohibited, a change of use does not operate to invalidate the policy, unless the change increases the risk. *Wood v. Hartford F. Ins. Co.*, 13 Conn. 533; *Manley v. Ins. Co. of N. America*, 1 Lans. (N. Y.) 20.

Unless the assured contracts that the same tenants shall continue to occupy the premises during the life of the policy, or that he will give notice of any change in that respect, a change of tenants does not avoid the policy, even though the first tenant was a very prudent and careful man and the last one *grossly careless*. The assured is not treated as guaranteeing that there will be no change or increase of risk, *as respects the habits of his tenants*, unless special conditions in respect thereto are incorporated into the policy. *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469; *Joyce v. Maine Ins. Co.*, 45 Me. 168. In the case last cited, the application contained an inquiry, "For what purpose *and by whom* occupied?" to which the assured replied, among other things, that the premises were occupied as a tavern stand by Eliphalet Sears. Sears was shown to be a very careful, prudent man. Before the policy expired, Sears moved from the premises, and a tenant, who was grossly careless, went into the occupancy thereof. "There is nothing," said JEWETT, J., "indicating that Sears would or should continue the occupant during the continuance of the insurance, but on the contrary, if anything be implied, it may, I think, be implied that a change of tenants might be made. . . . It would be unreasonable to imply that the defendants entered into the contract with the expectation that the then tenant was to continue in the occupation during the period of the running of the policy, *in the absence of anything of that sort being indicated in the application, policy, or proposals.*"

But when the *use* of the premises is changed, by any means within the control of the assured, and the policy provides that it shall be void "if the risk is increased by any means within his control," if he lets the premises to a tenant who devotes them to a hazardous use, it is held that the policy is avoided, whether the assured *knew* that the tenant devoted them to such use or not. *Appleby v. Fireman's, &c. Ins. Co.*, N. Y. 454.

Hably v. Dana, 17 Barb. (N. Y.) 111; Sarsfield v. Metropolitan Ins. Co., 61 id. 479; Witherell v. Ins. Co., 16 Gray (Mass.), 276; Shepherd v. Union, &c. Ins. Co., 38 N. H. 232; Harvey v. Mut. F. Ins. Co., 11 U. C. (C. P.) 394. In Lyon v. Commercial Ins. Co., the court held that if the assured was inquired of as to the occupancy of the building, and was told that the insurers would not insure if gamblers occupied any part of it, it was for the jury to say whether gamblers did occupy any part of it, and whether the risk was thereby increased. Robinson v. Mercer, &c. Ins. Co., 27 N. J. 134; Jones v. Fireman's Fund Ins. Co., 51 N. Y. 318; Williams v. People's Ins. Co., 57 id. 274.

But, it would seem that this would or rather should depend very much upon the question whether the assured had the power to prevent the hazardous use, and in Canada it is held that under such a condition the policy is not avoided, unless the assured *consented* to the use or alterations, or they were made with his knowledge, and that the mere fact that he might have entered and terminated the lease is not decisive of the question, because he is not bound to do it. Hencker v. British Am. Ass. Co., 14 U. C. (C. P.) 57. And under a policy containing such a condition, the erection of a building by the assured upon an *adjoining lot*, that increases the risk, invalidates the policy: Allen v. Massasoit Ins. Co., 99 Mass. 160; or an addition to the building. Francis v. Somerville, &c. Ins. Co., 25 N. J. 78; Merriam v. Middlesex, &c. Ins. Co., 21 Pick. (Mass.) 162. But where the policy simply provides that "if the premises shall be used, &c., or the risk shall be increased," it is held to relate to a use or increase of risk by the assured, *or with his assent*, and does not embrace a hazardous use or increase of risk made by a tenant. White v. Ins. Co., 8 Gray (Mass.), 566; Rice v. Tower, 1 id. 526; Henneker v. British Am. Ins. Co., 14 U. C. (C. P.) 57; Boardman v. Merrimac Mut. Ins. Co., 8 Cush. (Mass.) 583. In Sanford v. Mechanics', &c. Ins. Co., 12 Cush. (Mass.) 541, the court held that the insured could not be made chargeable for an increase of risk by tenants, unless expressly stipulated against.

But where the policy provided that *any* alteration in the building should avoid the policy, it was held that an alteration by a tenant had that effect. Merriam v. Middlesex, &c. Ins. Co., 21 Pick. (Mass.) 162. So where the policy stipulates that "any change by the assured, *or others*, &c.," the policy is avoided by whomsoever the change is made. Shepherd v. Union, &c. Ins. Co., 38 N. H. 232. In Miller v. Western Farmers', &c. Ins. Co., 1 Handy (Ohio), 208, the policy covered a brick tavern-house, with a condition that "in case the premises be altered, changed, or used for the purpose of carrying on or exercising therein any trade, business, or vocation in the conditions and by-laws annexed, so as to increase the hazard, so long as the same shall be so appropriated, applied, or used, this policy shall cease, and be of no force or effect." The insurers pleaded that the plaintiff had possession of the building next east and south, and adjoining the building insured; that the same was used by the tenants of the

insured, with his consent, for the purpose of manufacturing laths and spokes, which increased the risk of loss by fire to the building insured. It was held, the plea was no answer to the action, for, in the absence of all stipulations in the contract on the subject, the general maxim, *sic utere tuo ut alienum non laedas*, must govern the rights of the parties. Neither does the warranty apply to an increase of risk by strangers, as by the erection of buildings upon adjoining lots: *Southern, &c. Ins. Co. v. Lewis*, 42 Ga. 587; or applying the premises, without the consent of the assured, to a prohibited purpose, or one increasing the risk. *Loud v. Citizens' Ins. Co.*, *ante*; *Shaw v. Robberds*, *ante*. In *Rice v. Tower*, 1 Gray (Mass.), 566, the sheriff levied upon the goods of assured and took possession of the building, and sold goods at auction therein. *Held*, that although the policy prohibited the use of the building for any other purpose than that named in it, the policy was not invalidated unless the risk was increased thereby, nor, if the policy requires notice of any extraneous changes in the risk to be given, is the policy invalidated by any such change if notice is given. If the assured does not wish to carry the risk, in view of such changes, he must cancel the policy. *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313. Nor will a change in the occupancy or use of the premises, even though it increases the risk, invalidate it as against a loss resulting at a time when such use has ceased: *New Eng. F. & M. Ins. Co. v. Wetmore*, 32 Ill. 245; 4 Ben. F. I. C., 656; *Joyce v. Maine Ins. Co.*, 45 Me. 163; 4 Ben. F. I. C. 369; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *U. S. Ins. Co. v. Kimberley*, 34 Md. 234; 6 Am. Rep. 325; see *contra*, *Harris v. Columbian, &c. Ins. Co.*, 4 Ohio St. 285; *Mead v. N. W. Ins. Co.*, 7 N. Y. 530; or, as some of the cases *tend* to hold, *if the loss did not result from such change of the risk*.

In *Schmidt v. Peoria, &c. Ins. Co.*, 41 Ill. 295; 5 Ben. F. I. C. 90, the policy covered a tannery in the city of Chicago. The policy contained these words: "No fire in or about said building, except one under kettle securely imbedded in masonry (used for heating water) and made perfectly secure against accidents." The policy was issued on the 16th September, 1864. It was proved that the building was destroyed by fire in March, 1865, and that at the time of the fire there were two stoves in the building, one upstairs and the other on the first floor. It was also proved that there had been no fire in the stove on the first floor for eight days previous to the destruction of the building. In the stove upstairs a fire had been kindled at six o'clock in the morning and extinguished at eight or half past eight in the morning, and was not again rekindled. The fire occurred about eleven o'clock the following night.

"It is contended by the appellee," said LAWRENCE, J., "that the words in the policy above quoted are to be taken as a warranty, on the part of the assured, that there shall be no fire during the continuance of the policy, except the one under the kettle, and that a breach of the so-called warranty avoids the policy. In behalf of the appellants, it is in-

sisted that these words are, what is called by some writers upon insurance an affirmative as distinct from a promissory warranty, and are to be construed as referring to the condition of the property at the time the policy was issued. It is a question upon which the authorities differ; but, in view of the fact that insurance companies dictate the language of their own policies, which is, therefore, to be most strongly construed against themselves, and can, if they wish, insert a stipulation which in terms refers to the future use of the property, and do, by an express provision in this, as in, we presume, all policies, relieve themselves from all liability in case the risk is actually increased, we are inclined to adopt the ruling of those cases which hold that these words are to be construed in reference to the then condition of the property. *Smith v. Mechanics' Fire Ins. Co.*, 32 N. Y. 399; *O'Neil v. The Buffalo Ins. Co.*, 3 N. Y. 122; *Catlin v. The Springfield Ins. Co.*, 1 Sumn. 435; *Blood v. Howard F. Ins. Co.*, 12 Cush. 472; *Rafferty v. New Brunswick F. Ins. Co.*, 3 Harrison, 480. With this construction of that clause, no violation of it is shown.

“ There is however another clause in the policy, which the company invokes for its protection, as follows : ‘ If, after insurance is effected, either by the original policy or by the renewal thereof the risk be increased by any means, or the building is occupied in any way so as to render the risk more hazardous than at the time of insurance, such insurance shall be void and of none effect.’ This is a very material provision in the policy, and should not have been omitted from the abstract furnished by counsel for appellant. This language admits of no controversy as to its meaning and the only question under it is, was there such increased risk in consequence of these stoves at the time of the fire ? This court held, in *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 245, that the true construction of a clause like this was, that the policy became inoperative only while the increased risk was in existence, and when it terminated the liability of the company would recommence. The instruction asked by the defendant on this point, and given by the court, was in harmony with this ruling; but, on the trial, the defendant was permitted against the objections of the plaintiffs to call insurance agents as experts, and ask them the following question : ‘ Q. From your experience and knowledge of your business as an insurance agent, and of insurance, do you think that the increase of the number of fires in a building does or does not increase the risk of fire in that building ? ’ Neither this question, nor any of the evidence given under it, touched the true point in the case. The point for the consideration of the jury was not whether an increase of the number of fires in a building does or does not ordinarily increase the risk, *but whether, in the case then before the court, the risk to the building at the time it was destroyed, at eleven o'clock at night, was or was not increased by the two stoves, in one of which there had been no fire for eight days, and in the other none after eight and a half o'clock of the preceding morning. Was the risk to this particular building at the time it was burned greater in con-*

sequence of the presence of these stoves, placed as they were and used in the manner shown by the witnesses? This was a question of fact, to be passed upon by the jury, not in reference to the opinions of insurance agents as to the general effect of an increase of fires, but in reference to the facts of this particular case." See also, *Newhall v. Union, &c. Ins. Co.*, 52 Me. 180. Unless the description of the risk amounts to a continuing warranty, or the change in the risk has in some manner contributed to the loss, a mere change will not avoid the policy.

But while it is true that the tendency of the cases, and perhaps justly, is to hold *that the policy is only suspended, and not in fact vitiated by the increase of risk during its continuance, and that it is revived as an operative instrument when such increase in the hazard ceases, yet it is not necessary that the loss should have resulted from such hazardous use. It is enough if the premises were devoted to a more hazardous use that materially increased the risk, at the time of their destruction by fire, whether the fire resulted as a consequence thereof or not, because it is a breach of a condition of the policy.* *May v. Buckeye, &c. Ins. Co.* In *Merriam v. Middlesex, &c. Ins. Co.*, 21 Pick. (Mass.) 162, the tenants of the assured put stoves in the building, *which increased the risk, but did not cause the loss*, but the court held that the policy was void. *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.), 329; 5 Ben. F. I. C. 106. In *Glen v. Lewis*, 8 Eng. L. & Eq. 364; 8 Exch. 311, an insurance against fire was effected on certain premises, the policy containing among other things, the following conditions: "The persons making insurances to give an accurate description of the buildings, &c., and if there should be used therein any steam-engine, stove, &c., or any description of fire-heat other than common fire-places, &c., or any process of fire-heat be carried on therein, the same to be noticed and allowed in the policy, otherwise the policy to be void. In case of any circumstance happening after an insurance, whereby the risk should be increased, the assured to give notice in writing to the insurers, and the same previous to a loss, to be allowed by indorsement on the policy, otherwise the policy to be void. In case of any alteration being made in a building insured, &c., or of any steam-engine, stove, &c., or any other description of fire-heat being introduced, or of any trade, business process, or operation being carried on, or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon, &c., notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, such premiums paid and such indorsement made, no benefit will arise to the assured in case of loss." The assured, who was a cabinet-maker, placed a small engine on the premises, with a boiler attached, and used it in a heated state for the purpose of turning a lathe, not in the course of his business, but for the purpose of ascertaining, by experiment, whether it was worth his while to buy it, to be used in that business. After this engine had been on the

premises for several days, a fire happened, and it was held that the policy was avoided, *and that whether the fire was occasioned in consequence of the steam-engine being worked or not was immaterial.* Dodge Co., &c. Ins. Co. v. Rogers, 12 Wis. 337; Girard Ins. Co. v. Stephenson, 37 Penn. St. 293; Harris v. Columbian Ins. Co., 4 Ohio St. 285; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; Howell v. Baltimore Eq. Soc., 16 Md. 377; Appleby v. Astor Ins. Co., 54 N. Y. 253; Perry Co. Ins. Co. v. Stewart, 20 Penn. St. 45; Fabian v. Union, &c. Ins. Co., 33 N. H. 203; Sarsfield v. Metropolitan Ins. Co., 61 Barb. (N. Y.) 479; Gardner v. Piscataqua, &c. Ins. Co., 38 Me. 439; Appleby v. Fireman's Ins. Co., 45 id. 454; Sykes v. Perry Co. &c., Ins. Co., 34 Penn. St. 79; Allen v. Massasoit Ins. Co., 99 Mass. 160; Kern v. St. Louis, &c. Ins. Co., 40 Mo. 19; Shepherd v. Union, &c. Ins. Co., 38 N. H. 232; Francis v. Somerville, &c. Ins. Co., 25 N. J. 78; Lomas v. British, &c. Ass. Co., 22 U. C. (Q. B.) 310; Dittmer v. Germania Ins. Co., 23 La. An. 458. In a New Brunswick case previously cited, Faulkner v. Central F. Ins. Co., 1 Kerr (N. B.), 279, in a policy upon a vessel there was a prohibition against carrying more than twenty-five pounds of gunpowder, and a provision that the policy should be void if, *at any time*, there should be more than that quantity on board. The vessel was destroyed by fire, *and when the fire broke out* there were one hundred pounds of gunpowder on board, *but it in no wise contributed to the loss, as it was thrown overboard as soon as the fire was discovered*, but the court held that the fact that it did not contribute to the loss was of no account, *as the policy was invalidated by its presence on board when the fire broke out, because it was a breach of one of the conditions of the policy, and the breach continued up to the time when the loss occurred.* See also, Witherell v. City, &c. Ins. Co., 16 Gray (Mass.), 276.

Ordinary repairs may be made without a builder's risk, and do not operate as a violation of a condition against an increase of the risk; and even though the policy provides that "the working of carpenters, roofers, tin-smiths, gas-fitters, plumbers, or other mechanics in buildings, altering or repairing the premises named in this policy, will vitiate the same unless permission for such work be indorsed in writing hereon," it is held not to relate to *ordinary, casual necessary repairs, even though such repairs necessitate the keeping of carpenters constantly at work*, but as prohibiting such hazardous use of the building as arises from placing it in the possession or under the control of workmen for re-building, alterations, or repairs. BARTOL, C. J., in Franklin F. Ins. Co. v. Chicago Ice Co., 32 Md. 102. In the case last referred to the policy contained such a provision, and the president of the plaintiff company having testified that he always kept a crew of men and a carpenter or two about the building the year round, *and was constantly making repairs*, the defendants insisted that thereby the assured had forfeited its right to recover under the policy; but the court held otherwise. "To place upon it such a construction," said BARTOL, C. J., "as contended for by the appellant would defeat the intent

of the parties, and be repugnant to the written clause of the policy *insuring the building*; which, looking at its size, structure, and use, must have reasonably contemplated the necessity for such repairs as the witness described as indispensable to the proper conduct of the appellee's business. The evidence shows that the building was two hundred and sixteen feet long and one hundred and forty feet wide; that the height, from the top of the sill to the under sill of the plate, was twenty-six feet; that the walls were of joists three by six inches, hollow, two feet thick, filled in with tan; the materials all wood, bound with iron. There was a balcony round the upper part of the house, and an inclined plane of tramway fourteen feet wide extending from the lake to the plate of the ice-house, on which the ice was dragged up by horse power. The capacity of the house was *twenty-four thousand tons of ice*. It is very obvious that a building so constructed would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business of the appellee that breakages should be repaired as they occurred; all of which was known to the appellants, and will be presumed to have been in their contemplation at the time the contract was made, and permitted by the written terms of the policy insuring the premises as an ice-house." *Rann v. Home Ins. Co.*, 59 N. Y. 387; *Barrett v. Jeremy*, 3 Exch. 535.

The right to repair buildings is incident to the ownership and use of the property, and alterations which do not increase the risk, as well as ordinary repairs, may be made without affecting the validity of the policy. *Dorn v. Germania Ins. Co.*, 8 Chicago Legal News, 156. House-building or repairing prohibited in a policy refers to such occupations *as a business*, and not to necessary repairs made upon the buildings insured. *Grant v. Howard Ins. Co.*, 5 Hill (N. Y.), 10. And although in making such repairs hazardous articles are introduced into the building, as oils, turpentine, paints, &c., the insurer is not relieved from liability if such articles are necessary incidents of the repairs in progress: *O'Niel v. Buffalo Ins. Co.*, 3 N. Y. 122; *Billings v. Tolland, &c. Ins. Co.*, 20 Conn. 139; or even though the facilities for extinguishing fires described in the policy, are thereby temporarily suspended. *Townsend v. N. W. Ins. Co.*, 18 N. Y. 168. Even where *alterations* materially increasing the risk are made, and alterations are prohibited in the policy, yet, if the insurer knew that they were in progress when the policy was made: *Hotchkiss v. Germania Ins. Co.*, 5 Hun (N. Y.), 90; or that they were contemplated: *Perry Co. Ins. Co. v. Stewart*, 19 Penn. St. 45, the jury may find a waiver or assent to such alterations. Where alterations are made by a tenant, the insurance is not avoided, unless the prohibition is broad enough to cover all alterations by whomsoever made unless they are made with the assent of the assured, and the fact that he assented to some alterations being made does not necessarily defeat the liability of the insurer. It is for the jury to say *whether such extensive alterations as those made were contemplated*

by the parties. Paddleford v. Providence, &c. Ins. Co., 3 R. I. 102; Sanford v. Mechanics', &c. Ins. Co., 12 Cush. (Mass.) 541. But, while it is true that trifling changes in the risk or ordinary repairs may be made even where the policy prohibits all alterations or repairs without the assent of the company, yet *this does not cover material alterations or extraordinary repairs.* Howell v. Baltimore Equitable Society, 16 Md. 377; Harris v. Columbian Mut. Ins. Co., 4 Ohio St. 285; Dodge Co. Mut. Ins. Co. v. Rogers, 12 Wend. (N. Y.) 337; Kern v. South St. Louis, &c. Ins. Co., 40 Mo. 19; Allen v. Massasoit Ins. Co., 99 Mass. 160; Rann v. Home Ins. Co., 59 N. Y. 387-

The insurer must prove the increase of risk: Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123; Ritter v. Sun, &c. Ins. Co., 40 Mo. 40; and the mere fact that a change in the risk is made does not make out his defence. *He must show by a fair preponderance of proof that the change increased the risk.* Lattaurus v. Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404. If the use to which the premises were being devoted when the loss occurred was prohibited, the fact that the insurer *knew* of such use does not save the forfeiture. He has a right to rely upon it that the assured will perform the conditions of the contract, or that, if he fails to do so, he waives the benefits of the policy. Dewees v. Manhattan Ins. Co., 35 N. J. 366. By devoting the premises to such use, the policy is suspended during its continuance, without reference to the question whether the risk was increased or not. Ditmer v. Germania Ins. Co., 23 La. An. 458; United States Ins. Co. v. Kimberley, 34 Md. 227. But it must be a change of the risk by something permanent or habitual. *A mere temporary use does not come within the prohibition.* Loud v. Citizens' Ins. Co., 2 Gray (Mass.), 221; Gates v. Madison Co. Ins. Co., 5 N. Y. 469; Leggett v. Ætna Ins. Co., 10 Rich (S. C.); Moore v. Protection Ins. Co., 31 Me. 223; Shaw v. Robberds, 6 Ad. & El. 75; Dobson v. Sotheby, M. & M. 86.

NOTE 71. See NOTE 73.

NOTE 72. **Misdescription, Effect of.**—In order to avoid a policy upon the ground of misdescription, the description must be so radically defective that of and by itself it cannot be applied to the subject-matter to which it was intended that it should apply. Bryce v. Lorillard Ins. Co., 55 N. Y. 240; Ionides v. Pacific Ins. Co., L. R. 6 Q. B. 674. A mere erroneous description does not prevent the policy from attaching, if there is enough to point with reasonable certainty to the subject-matter intended to be covered. The maxim *falsa demonstratio non nocet* applies in such cases, as well as to other written instruments, and the description, so far as it is false, is rejected, and applies to no subject at all, and, so far as it is true, is applied to carry out and effectuate the real purpose and intention of the parties. In Heath v.

Franklin Ins. Co., 1 Cush. (Mass.) 257, the policy covered a building "on the corner of Charles Street and Western Avenue. A cabinet-maker's shop is in the building." In point of fact, there was no cabinet shop there, and the insurers insisted that their policy did not cover the building destroyed, although it was on the corner of the streets named. In passing upon the question, DEWEY, J., said: —

"In the policy itself and on the face of it, there is nothing to create any ambiguity as to the description of the building. But, upon proof of the circumstances and the actual state of things in reference to the two buildings, the ambiguity arises. The plaintiff, however, insists that, upon the proper reading of the description in the policy, it may well be taken to apply to the western building; and this would very clearly be so if the words 'situate at the corner of Charles Street and the Western Avenue' are to be taken as referring to the 'adjoining building,' and not to the building insured. But this, we think, cannot be maintained. The case does not seem to be one in which any grammatical rule, referring the words 'situate,' &c., to the next antecedent, can properly be applied. Such a rule is not one of general application, especially to cases like the present, where the words are used in a continuous description of various distinct and independent circumstances, applicable to the building insured, and which, from their very nature, are distinct and independent descriptions.

"The object of each and all these different descriptions is to set forth fully all the essential circumstances relating to the property insured. Among these circumstances the most prominent is the location of the building to be insured. We might well expect as a part of the description contained in the policy a statement of the location of the particular building which was the subject of it; and it is much more natural and probable that the location of the building insured should be given, than the location of a building not insured, and which was only introduced incidentally to disclose the manner of the connection of the building insured with an adjacent building. We cannot doubt that a proper reading of the policy requires that the words 'situate at the corner of Charles Street and the Western Avenue' should be applied to the building insured, rather than to the adjoining building. Having settled this point, we are then to look at the whole description, and see whether it can, upon any sound principle, apply to the western building. And in reference to this inquiry it will be seen that the recital in the policy, as we have just held, varies from the description which would embrace the western house, in the most material particular, namely, the house insured is described as situate at the corner of Charles Street and the Western Avenue; but that is the location of the eastern house, and not the western. That part of the description, therefore, being inappropriate, the application of the policy to the western house must be shown by other parts of the same description. We do not doubt the propriety of rejecting a particular

description, which is clearly false, in order to give effect to other descriptive words, when such words are sufficient to define the object intended to be described. In such a case the false description may be rejected as surplusage. But the difficulty here is, that we are called upon to reject that particular part of the description which is the most leading. Again, if we reject this description, we have no other elements of description sufficient to embrace any particular house as within the policy. Striking out the words 'situate at the corner of Charles Street and the Western Avenue,' we have no locality and no particular house insured.

"The matter stands thus as to the western house. Rejecting this particular in the description as false, and giving full force and effect to all the other parts of it, the description is then so substantially defective that it cannot be held to apply to the particular house which the plaintiff insists was insured. This view of the case precludes the plaintiff from recovering damages for any loss which he may have sustained in the destruction of the western house by fire. It was suggested, that the policy might be construed to embrace the whole block, that is to say, the two buildings, and thus avoid the difficulty in the variance of the description as to situation. But we think that this cannot have been the true intention of the policy, the description clearly referring to one building, and that a building 'connected by doors with the adjoining building.'

"The next inquiry is, whether this policy must totally fail for uncertainty in the description, or whether it may be held to attach to the eastern building, which, it was in evidence, had sustained some small damage by fire. The fact that the parties intended to cause a policy to be made as to one of these two buildings will hardly be doubted; and, having decided that the western house was not covered by the policy, it might seem to result as a matter of course that the policy attached to the eastern house. But such is not necessarily the consequence, as the description may be equally uncertain as to both. In such case the policy must wholly fail. But the fact that the policy was intended for the one house or the other may have some influence; and if there be not only a preponderance of evidence resulting from the description and the actual state of things, in favor of one building rather than the other, *but sufficient evidence after rejecting the false description to identify the particular building*, we may well conclude that such building is covered by the policy, and was designed to be so by the parties. In looking at the policy, we find all the leading descriptions, and particularly that of location, to be directly applicable. The only description that is inapplicable, and which appears by the evidence not to be true, is the recital, 'a cabinet-maker's shop in the building.' . . . The rules of law fully authorize the rejection of any false description, *if what remains* be sufficient to clearly designate the object intended to be described. . . . We are of the opinion that the recital, 'a cabinet-maker's shop is in the building,' may be rejected as erroneous, and that the policy will then attach to the eastern building."

This must be understood, however, as only applying to cases when, after rejecting the false description, there is enough left of that which is true to describe the property intended to be covered, with reasonable certainty. *PARTESON, J.*, in *Hubbard v. Hubbard*, 15 Q. B. 241. The application of this rule is well illustrated in a New York case, *Jackson v. Sill*, 11 Johns. (N. Y.) 201, in which the testator devised to his wife, during her life, "the farm which I now occupy;" and it was claimed that he intended to devise the whole of his real estate, which included a farm of about ninety acres, at that time in the occupancy of a tenant, and that he gave such instructions to the attorney who drew the will; and the plaintiff offered to show these facts. But the court held that the evidence was inadmissible, because there was no latent ambiguity, but a mistake merely, which could not be corrected by evidence outside the instrument itself. In the English case last referred to, the testator devised to the defendant "all those two cottages or tenements, the one occupied by my son John Hubbard, the other occupied by my granddaughter." The building which the defendant claimed passed to him, under the will, was divided into four parts or tenements, having no communication with each other; one tenement, which was occupied by John Hubbard, and another by the testator's granddaughter, one by the defendant, and the other by another tenant. The defendant claimed that the testator intended to devise to him the *whole* building, and offered to show that such was the intention of the testator, but the court rejected the evidence. "Can the legal maxim," said *WIGHTMAN, J.*, "that a false demonstration does not prejudice, apply to this case? I think not. *The maxim applies only to cases in which the false demonstration is superadded to that which was sufficiently certain before.* In the present case, if the demonstration said to be false were rejected, the terms of the devise would be: 'I do hereby give to my son, David Hubbard, two cottages, &c.,' leaving it uncertain which or where."

Thus it will be seen that in all cases where, after rejecting all the description that is false, there is not enough left that is true, to point with reasonable certainty to the premises intended to be covered by the policy, the policy is inoperative, and the error cannot be corrected by parol evidence, either in an action upon the policy or to reform it. *Bryce v. Lorillard Ins. Co.*, *ante*. In *Ionides v. Pacific Fire Ins. Co.*, *ante*, the plaintiff's clerk applied for insurance upon hides on board "The Socrates." Five ships were named in the register, one name immediately following the other, and the first "Socrates" and the other "Socrate." The manager asked the clerk which ship he meant, and he replied, "The Socrates." The hides were really shipped on "The Socrate," and were lost, and it was held that they were not covered by the policy. In *American Central Ins. Co. v. McLanathan*, 11 Kan. 533, the plaintiff took out a policy for \$2000 on his two-story frame dwelling, occupied by him, situate on southwest corner of Second and Vine Streets, Leavenworth, Kansas, and \$300 on frame barn in rear of same. The agent of insurer knew the

premises for which insured sought insurance, — that they were situated on the southwest corner of Elm and Second Streets, and that neither party intended to cover property on the corner of Vine and Second Streets. *Held*, not a case of an entire misdescription, for insured did not occupy the buildings on the corner of Second and Vine Streets, and therefore it was unnecessary to have the instrument reformed, because, if either from the face of the instrument or from extrinsic facts the true and the false description could be made to appear, that which was false must be rejected (citing 1 Greenl. Ev. sec. 301). *Held*, also, no repugnance appeared on the face of the instrument. Applying it to the subject insured, the true and the false description appeared, and that which was false must be rejected.

Goods insured as being in a certain building are covered, although at the time of the loss they are in a part of the building not occupied by the assured when the policy was made. Thus a policy was issued upon "goods contained in a third story of building 18 and 19 Harvard Place, Boston. To be void if said property shall be moved without necessity." Prior to the loss, the goods were removed into other rooms in the *same* story of the building, where they were destroyed by fire. It was held they were covered by the policy. *West v. Old Colony Ins. Co.*, 9 Allen (Mass.), 316. But where goods are insured as being "in the store part of the building," if removed to *another* part of the building they cease to be covered. *Boynton v. Clinton, &c. Ins. Co.*, 16 Barb. (N. Y.) 254. The Baltimore Fire Ins. Co. issued a policy of insurance to a railway company, insuring "two Murphy & Allison passenger cars, *contained in* car-house No. 1, and engine J. H. Nicholson, *contained in* engine-house No. 2." One of the cars and the engine described in the policy having been subsequently damaged by fire while making a regular trip on the line of the railway, in an action on the policy, *held* that the words "contained in" were designed to restrict the risk to the property while actually inside of the car and engine-houses specified in the policy; and that the railway company could not recover for the loss. *Annapolis, &c. R. R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37.

NOTE 73. Fraudulent Concealment. — It is the duty of the assured to communicate to the insurer all such facts relating to the risk as would be likely to influence the latter in accepting or rejecting the risk or in estimating the rate of premium to be charged therefor. *Lexington Ins. Co. v. Powers*, 1 Ohio, 324; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 416; *Houghton v. Manufacturers' Ins. Co.*, 8 Met. (Mass.) 114; *Washington, &c. Ins. Co. v. Merchants', &c. Ins. Co.*, 1 Handy (Ohio), 408; *Locke v. Ins. Co.*, 13 Mass. 97; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Clark v. Union Ins. Co.*, 40 N. H. 333; *Girard, &c. Ins. Co. v. Stephenson*, 37 Penn. St. 293; *M'Lanahan v. Ins. Co.*, 1 Pet. (U. S.) 170; *Columbian Ins. Co. v. Lawrence*, 10 id. 507; *Bunday v. Union Ins.*

Co., 2 Wash. (U. S. C. C.) 243; *Sale v. Phenix Ins. Co.*, 1 id. 283. In order, however, that the suppression of a material fact shall have the effect to vitiate the policy, it must not only be material to the risk, but also of some fact that is not equally within the knowledge of the insurer, and that is not patent, or such as may fairly be regarded as probable. *People v. Liverpool, &c. Ins. Co.*, 2 N. Y., S. C. 268; *Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402; *Gerhauser v. Ins. Co.*, 7 Nev. 174; *De Wolf v. N. Y. Fireman's Ins. Co.*, 20 Johns. (N. Y.) 214; *Fish v. Liverpool, &c. Ins. Co.*, 44 N. Y. 538; *Norris v. Ins. Co.*, 3 Yeates (Penn.), 84; *Walden v. Louisiana Ins. Co.*, 12 La. 134; *Bowery Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Boggs v. American Ins. Co.*, 30 Mo. 63; *Perkins v. Equitable Ins. Co.*, 4 Allen (N. B.), 562; *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Syneers v. Glasgow Ins. Co.*, 19 Scotch Jur. 49; *People v. Liverpool, &c. Ins. Co.*, 2 T. & C. (N. Y.) 268.

The concealment, when no inquiries are made of the assured, must be intentional and fraudulent. *Holmes v. Charlestown, &c. Ins. Co.*, 10 Met. (Mass.) 211.

If the insurer makes any inquiries, the assured has a right to suppose that he inquires as to all matters that he regards as material, and waives knowledge as to all other matters, *except it be in reference to unusual or extraordinary circumstances, in reference to which the assured has knowledge, but in reference to which there is nothing to put the insurer upon inquiry.* *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; 3 Ben. F. I. C. 643; *Gates v. Madison, &c. Ins. Co.*, 5 N. Y. 43; 3 Ben. F. I. C. 288; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235; 2 Ben. F. I. B. 520; *Burritt v. The Saratoga Ins. Co.*, 5 Hill (N. Y.), 192; 2 Ben. F. I. C. 276; *Com. v. Hide & Leather Ins. Co.* 112 Mass. 136; *Liberty Hall Ass'n v. Housatonic, &c. Ins. Co.*, 7 Gray (Mass.), 261; *Hall v. People's Ins. Co.*, 6 id. 185. It was well said by BRONSON, J., in the case last cited, that, "*if a man is content to insure my house without taking the trouble to inquire of what materials it is composed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground of complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature of the risk.*" In a case in the United States Court, *Clark v. Manufacturers' Ins. Co.*, ante, WOODBURY J., in discussing the question, says: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must be supposed to assume them; and if he acts without inquiry anywhere concerning them, seems quite as negligent as the assured who is silent when not requested to speak." The rule thus expressed, extended as it was in an Ohio case, *Hartford Protection Ins. Co. v. Harmer*, ante, by RAMSAY, J., may be said to be the rule generally applied in such cases. He said, in speaking of the rule expressed in these cases: "This, I confess, seems to me the true rule;

perhaps with the qualification more distinctly indicated . . . *that the insured does not withhold information of such unusual and extraordinary circumstances of peril to the property, as could not with reasonable diligence be discovered by the insurer, or reasonably anticipated as a foundation for specific inquiries.*"

Where the insured, at the time of obtaining insurance, knows that the building has just previously been on fire, and *suspects*, but has no reliable reason therefor, that it was set, the question as to whether the concealment of such fact is *material* is for the jury, and in determining that question, it is proper for them to consider the grounds of the assured's suspicions, as well as the fact they proved to be unfounded. In *Harmer v. Protection Ins. Co.*, 2 Ohio St. 452; 3 Ben. F. I. C. 643, the plaintiff procured insurance upon some buildings, and tobacco stored therein. It appeared that just prior to the procurement of the insurance, one of the buildings had been on fire, and the plaintiff suspected that it was fired by an incendiary. The plaintiff did not communicate this fact to the agent of the insurer, and in fact his suspicions were not well grounded; and it was proved that the building was accidentally fired. The court instructed the jury to refer to and be governed by *the true cause of the fire, and not by the belief of the assured*, in determining the materiality of the facts concealed. This ruling was sustained, RAMSAY, J., pertinently remarking: "So far as his belief was of any value as an admission of the true cause, it went to the jury for what it was worth, and the company had the full benefit of it, and if his belief correspond with the true cause, of course no injury was done them. If it did not, of what importance was his belief or suspicion to them? Before the duty of disclosure arises, the fact must be material to the risk; that is, it must increase the chances of loss. If it was not in truth material, could his erroneous suspicions make it so? It was not pretended that he knew the cause, or had received any information true or false which he failed to communicate. In such cases the marine rule is, that the assured is not bound to communicate his own expectations and opinions and speculations upon facts," and this was held by the court to be the rule applicable to fire insurance.

Where the plaintiff, in seeking re-insurance of a risk, knowing that the owners of the property had had difficulties about their losses, and were in bad repute among insurers, failed to disclose the fact, it was held a fraudulent concealment. *Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359. See same in principle, *Leigh v. Adams*, 25 L. T. (U. S.) 566; *Costa v. Scandrè*, 2 P. W. (U. S.) 176. So where there had been a rumored attempt to destroy the premises by an incendiary, of which the insurer had knowledge. *Walden v. Louisiana Ins. Co.*, 12 La. 134; *American F. Ins. Co. v. Throop*, 22 Mich. 146. But if there is no foundation in fact for the rumor, it has been held not to amount to a concealment of a material fact. *Hartford Protection Ins. Co. v. Harmer, ante.*

Where the assured has attempted to procure insurance elsewhere upon a ship, but on account of apprehensions of the loss of the vessel, the risk was refused, and he omitted to disclose the existence of such apprehensions, and the vessel was in fact lost, it was held a fatal concealment. *Vale v. Phoenix Ins. Co.*, 1 Wash. (U. S. C. C.) 283. And it seems that if he has *heard* of the loss, and neglects to disclose the fact, and the intelligence proves correct, a policy obtained without disclosing the fact is void: *Johnson v. Phoenix Ins. Co.*, 1 Wash. (U. S. C. C.) 378; *Moses v. Del. Ins. Co.*, 1 id. 385; and it seems that this is so, if the assured had no actual intelligence of the loss, but had reason to apprehend it: *Moses v. Del. Ins. Co.*, *ante*; *Hoyt v. Gilman*, 8 Mass. 336; *Bowker v. Smith*, F. C. (Sc.) 571; or even if he had heard rumors of a loss, but did not believe them. *Graham v. Ins. Co.*, 6 La. An. 432.

When the assured is required to give information upon a particular point, he must give it correctly, and he must not, upon any ground, withhold material information or knowledge that he has in reference thereto. By putting an inquiry to him, the insurers have made the matter material, and he cannot excuse himself for not stating *all* the facts, upon the ground that he did not suppose it was material. As, when inquiry is made as to the *present* value of the property, it should be stated *at its present value*, and not *at its expected value* at some future time. *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; 3 Ben. F. I. C. 777. In such cases, so far as the question of value is concerned, strict exactness is neither expected nor required; but the insurer is entitled to have the *honest judgment* of the assured, and not a fanciful or knowingly false statement thereof. The mere fact that the property is overvalued does not of itself necessarily establish fraud on the part of the insured, so as to avoid the policy; but if the valuation is *knowingly excessive* or if it is *grossly and enormously excessive*, it is a circumstance to be considered in determining whether it is fraudulent. *Protection Ins. Co. v. Hall*, *ante*; *Franklin F. Ins. v. Vaughn*, 92 U. S. 516. But where, from the character of the risk, it is evidently *the understanding of the parties* that the value will be fluctuating, and that the policy relates to the average value, rather than the value at any particular time, if the assured overstates the value of the property as *then* existing, but states it at a sum that he reasonably expects it soon will be, his statement thereof will not amount to an overvaluation, although his expectations were not realized. In *Lee v. The Howard Ins. Co.*, 11 Cush. (Mass.) 321, the policy contained a clause by which it was covenanted that the application was "a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, *value*, and risk of the property, so far as the same are known and are material to the risk." The application stated the value of the goods to be between \$2,000 and \$3,000. The value of the property was much less than \$2,000 at the time when the policy was issued, and a loss having occurred, the insurer insisted that the policy was void, because the warranty as to value was

broken; but the court held that, *if the representation was made in good faith*, that the stock on hand, with that which was to be added and kept during the life of the policy, should range between those sums, the policy was not void.

The assured is not bound to communicate facts arising subsequent to the issue of the policy, unless expressly required by the terms of the policy: *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 535; *Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664; *Kohne v. Ins. Co.*, 1 Wash. (U. S. C. C.) 93; *Whittaker v. Ins. Co.*, 29 Barb. (N. Y.) 312; *Baldwin v. Choteau Ins. Co.*, 56 Mo. 151; *Keim v. Home, &c. Ins. Co.*, 42 Mo. 38; *Am. Ins. Co. v. Patterson*, 28 Ind. 17; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501; *Tyler v. New Amsterdam Ins. Co.*, 4 Robt. (N. Y.) 151; *Ellis v. Albany City Ins. Co.*, 50 N. Y. 402; *Mobile, &c. Ins. Co. v. McMillan*, 31 Ala. 711; *Commercial, &c. Ins. Co. v. Union, &c. Ins. Co.*, 19 How. (U. S.) 318; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *Clapp v. Union Ins. Co.*, 27 N. H. 143; *Delahy v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684; nor unless they are material to the risk, the question of materiality being for the jury. *Ritt v. Washington Ins. Co.*, 41 Barb. (N. Y.) 353; *Kohn v. Ins. Co.*, 6 Binn. (Penn.) 219; *North American Ins. Co. v. Throop*, 22 Mich. 146.

The concealment of facts relating to the *interest* of the assured in the property: *Sussex Co. Ins. Co. v. Woodruff*, *ante*; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Catron v. Tenn. M. & F. Ins. Co.*, 6 Humph. (Tenn.) 176; *Cousins v. Nantes*, 3 Taunt. 513; or relating to peculiar hazards to which the property is exposed, as incendiary threats to destroy it, or rumored attempts to do so, or threats or attempts to burn adjacent buildings, the burning of which would necessarily endanger the property of the insured, if material to the risk, avoid the policy. In *North American F. Ins. Co. v. Throop*, 22 Mich. 146, inquiries were made of the plaintiff whether incendiary attempts had been made to fire the property, to which he answered, "No;" but the evidence shows that such attempts had been made, of which he had notice. The court instructed the jury that such attempts to fire the building might not be material to the risk. Upon appeal this was held error, the court holding that, as matter of law, such attempts were material, and that if such threats had been made and the plaintiff failed to disclose them, he could not recover. The effect of neglecting to disclose incendiary threats or attempts to burn the property is necessarily material. In *Bufe v. Turner*, 6 Taunt. 328, a fire broke out on Saturday, in a boat-builder's shop, near the plaintiff's premises, and was apparently extinguished at about eight o'clock that evening. It was thought necessary to watch the premises, however, and on Monday the fire broke out again, and consumed a warehouse next but one to the premises that first took fire. On the Saturday evening, *when the fire was apparently out*,

after the ordinary mart had been started, the owner of the warehouse sent instructions for its insurance by an extraordinary conveyance, but failed to communicate the fact of the fire which had occurred. It was held, on general principles, and without reference to the rules and conditions of the company, that this concealment rendered the policy void.

So if the property is located in the vicinity of buildings, in which, to the knowledge of the insured, extra-hazardous trades are prosecuted, or uses which materially enhance the risk, as a petroleum storehouse, oil refinery, oil-cloth manufactory, powder-mill, cabinet-shop, steam saw-mill, or other similar establishments, there would seem to be no question that ordinarily, within the principle applicable to the concealment of *material* facts, the policy would be void. Proximity to what establishments would bring the insured within this rule cannot be stated, but it is believed to be safe to say, that if any trade or business is carried on in the immediate neighborhood of the property of the insured that *materially* affects the risk, in the respects previously stated, a concealment of such facts would render the policy inoperative and void. In *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425, an application was made for insurance upon the plaintiff's building, and a diagram was made showing the situation of other buildings in reference thereto. There was a building contiguous to the plaintiff's used for painting barrels and in which benzine was kept and used, and it was held that a failure by the plaintiff to communicate such facts to the insurer rendered the policy void, such fact being material to the risk.

In order to avoid the policy upon the ground of *incendiary threats*, the danger must be real and substantial, and such as materially enhances the risk, and which a person of ordinary prudence would not regard as mere idle talk or reports. *McBride v. Republic Ins. Co.*, 30 Wis. 562. The fact that the property is in a section of country where desperate measures for the gratification of private revenge are sometimes resorted to, and that the assured is very unpopular, or that those having the custody of the property are so, need not be disclosed, as the insurers are presumed to know the condition of society in communities in which they insure property: *Keith v. Globe Ins. Co.*, 52 Ill. 518; and it is a well-settled rule that a party is not bound to communicate facts which the law presumes the other party knows. *Norris v. Ins. Co. of N. America*, 3 Yeates (Penn.), 84; *Delonguemere v. N. Y. F. Ins. Co.*, 10 Johns. (N. Y.) 120. And if the insurer *knew* the facts which he complains were concealed, from *any* source, at the time he made the contract, a fraudulent concealment cannot be predicated thereon, as, where the insurers had previously directed a policy upon the same risk to be cancelled, because of incendiary threats to destroy it, it was held that the fact that the insured did not state the fact was not a concealment of a material fact: *Fish v. Cottinett*, 44 N. Y. 538; at least the point was made by the defendant in the last-named case, and the court did not deem it of sufficient importance to

notice it in their opinion. If inquiries are made, even in reference to matters about which the insurer has knowledge, he is bound to disclose all material facts. *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402.

NOTE 74. See NOTE 69.

NOTE 75. **Negligence of Assured causing Fires.** — Mere negligence on the part of the assured will not defeat a recovery on a policy, unless it is of such a character as amounts to recklessness or wilful misconduct. *Hyndes v. Schenectady, &c. Ins. Co.*, 16 Barb. (N. Y.) 119; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Johnson v. Berkshire Ins. Co.*, 4 Allen (Mass.), 388; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Chandler v. Worcester, &c. Ins. Co.*, 3 Cush. (Mass.) 328; *Williams v. N. E. Mut. F. Ins. Co.*, 31 Me. 219; *Maryland F. Ins. Co. v. Whitford*, 31 Md. 219; *Huckins v. Ins. Co.*, 31 N. H. 238; *Waters v. Merchants' Ins. Co.*, 11 Pet. (U. S.) 213; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Sherwood v. Ins. Co.*, 14 How. (U. S.) 351; *Gove v. Farmers' Ins. Co.*, 48 N. H. 41; *Young v. Washington, &c. Ins. Co.*, 14 Barb. (N. Y.) 545; *Sandford v. Ins. Co.*, 12 Cush. (Mass.) 541; *Kune v. Hibernia Ins. Co.*, 38 N. J. L. 441; *Campbell v. Monmouth Ins. Co.*, 59 Me. 430; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Citizen's Ins. Co. v. Marsh*, 41 Penn. St. 386; *Morel v. Mississippi, &c. Ins. Co.*, 4 Bush (Ky.), 585; *Himley v. Stewart*, 1 Brev. (S. C.) 209; *Sherry v. Del. Ins. Co.*, 2 Wash. (U. S. C. C.) 243; *Mueller v. Putnam Ins. Co.*, 45 Mo. 84; *Whitehurst v. Fayetteville, &c. Ins. Co.*, 7 Jones (N. C.), 352; *Kansas Ins. Co. v. Berry*, 8 Kan. 159; *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311; *Champlin v. Railway Passenger Assurance Co.*, 6 Lans. (N. Y.) 71; *Arctic F. Ins. Co. v. Austin*, 6 T. & C. (N. Y.) 63; *Brown v. Kings Co. F. Ins. Co.*, 31 How. Pr. (N. Y.) 508; *Henderson v. Western Ins. Co.*, 10 Rob. (La.) 164; *Sherlock v. Globe Ins. Co.*, 1 Cin. Superior Ct. (Ohio) 193; *Perrin v. Protection Ins. Co.*, 11 Ohio St. 147; *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33; *Phenix F. Ins. Co. v. Cochran*, 51 Penn. St. 143; *Atlantic Ins. Co. v. Sturm*, 63 N. Y. 77.

In a large number of early cases it was held that the insurer, in order to avoid liability upon the ground of wilful burning, must show either that the assured was guilty of negligence so gross as to amount to design, or that he purposely set the fire, and that he must establish this defence beyond a reasonable doubt. *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118; *Tucker v. Call*, 45 Ind. 31; *Ellis v. Lindley*, 38 Iowa, 461; *Fountain v. West*, 23 id. 9; *Hopkins v. Smith*, 3 Barb. (N. Y.) 559; *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Thayer v. Boyle*, 30 Me. 475; *Butman v. Hobbs*, 35 Me. 227; *McConnell v. Delaware, &c. Ins. Co.*, 18 Ill. 228; *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225; *Steinman v. McWilliam*, 6 Penn. St. 170; *Shultz v. Pacific Ins. Co. (Fla.)* 2 Ins. L. J. 495.

But the more modern and better class of cases hold that it may be established by a fair preponderance of evidence. *Ellis v. Buzzell*, 60 Me. 209; *Blaeser v. Milwaukee, &c. Ins. Co.*, 37 Wis. 31; *Knowles v. Scribner*, 57 Me. 497; *Rothchild v. American Ins. Co.*, 62 Mo. 356; *Matthews v. Huntley*, 9 N. H. 150; *Marshall v. Marine Ins. Co.*, 43 Mo. 586; *Schmidt v. N. Y. Union Ins. Co.*, 1 Gray (Mass.), 529; *Scott v. Home Ins. Co.*, 1 id. 105.

Even though the premises are set on fire by the assured himself when insane, the insurers remain liable. It is only when the loss results from the voluntary act and misconduct of the assured that the policy ceases to protect him. In *Karow v. Continental Ins. Co.*, 57 Wis. 56, the assured, while insane, set fire to the buildings covered by the policy in suit, and the court held that he could recover for the loss. CASSADAY, J., said: —

“ Assuming that the defendant called for proofs of loss, yet we do not think such call was made with such knowledge of the facts as to waive the defence alleged, that the assured burned his own buildings.

“ In submitting the question of insanity, the court in effect charged the jury that they must look outside of the commission of the act of which the assured was charged, and could only find him insane from other and independent testimony in no way connected or associated with the crime. Assuming that the plaintiffs had the right to have the question of insanity submitted to the jury, then the mental condition of Wis-kow at the time of the burning was the material subject of inquiry. Certainly his acts, being of the character indicated, tended to show what his mental condition was at that time. It is undoubtedly the law that where the only evidence tending to prove insanity is the commission of a given crime, such act of itself is not sufficient to establish insanity. The mere fact that a man commits suicide does not even raise a presumption of insanity at the time. It is however a fact which, in connection with other evidence, becomes very pertinent to the issue. Especially is this so where the suicide is immediately preceded by the murder or attempted murder of members of the suicide's family, and the destruction of his property without any apparent motive or even provocation. The rule is elementary, and must exist from the very nature of the question to be determined.

“ The learned counsel for the defendant virtually concedes the rule. For this manifest error in the charge therefore the case must be reversed, unless the determination of the question of insanity was immaterial, as urged by counsel for the defendant. He claims that the burning of the buildings by the assured relieved the company from all liability, regardless of the question whether he was at the time sane or insane, and such seems to have been the opinion of the court during a portion of the trial. The question is important, and the principal one discussed upon the argument. Counsel on both sides concede their inability to find any adjudi-

cated case directly in point. Upon the part of the plaintiffs it is urged that the case is the same in principle as the liability of a life insurance company, where the assured has committed suicide ; and several cases are cited which hold, in effect, that if the assured was insane at the time of the suicide, then the company is liable, otherwise not.

“On the other hand, it is claimed upon the part of the defence that those cases have no application to fire insurance; that the two classes of contracts are essentially different; that a policy of fire insurance is a contract of indemnity, — a contract for compensation for damages actually sustained; whereas a policy of life insurance is a contract to pay a certain sum of money upon the death of a person named, which is sure to happen, and that such payment is to be made regardless of the value or worthlessness of the life insured. Having thus distinguished the two classes of cases, the learned counsel contends, that while an insane person cannot be guilty of a crime, nor liable for a tort wherein the intent is a necessary ingredient, yet that a lunatic has always been held liable for other torts resulting in damage. In support of this, counsel cites several cases, and argues from them that if a lunatic burns the buildings of A., he is liable to A. for the amount of the actual damages sustained; and that since this is so, it must follow that a lunatic cannot burn his own buildings, upon which he has previously obtained an insurance, and then turn around and recover of the insurer the damages he has sustained by reason of his own act.

“The argument is plausible, and deserves very careful consideration, especially in the absence of any direct authority upon the question involved. In order to appreciate its force, it may be well to consider the precise ground upon which such liability is predicated. *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 650, was an action for false imprisonment on void process issued by the defendant when a lunatic, and Judge HARRIS stated the rule thus: ‘He [a lunatic] is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent, which is the very essence of crime; but a civil action to recover damages for an injury may be maintained against him, because the intent with which the act is done is not material. . . . Ordinarily, in an action for a personal injury, the amount of damages is, at least to a considerable extent, governed by the motive which influenced the party in committing the act. . . . But in respect to the lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured.’

“In *Morse v. Crawford*, 17 Vt. 499, the defendant, while insane, killed the plaintiff’s ox, and in an action against him therefor the court said: ‘It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently, no reason can be assigned why

a lunatic should not be held liable.' To the same effect, *Behrens v. McKenzie*, 23 Iowa, 333. In *Beals v. See*, 10 Penn. St. 61, Chief Justice GIBSON said: 'As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it.' This was quoted approvingly in *Lancaster v. Moore*, 78 Penn. St. 413; s. c. 21 Am. Rep. 24.

"Thus the liability is made in no way dependent upon intent or design to commit the act complained of, but is based upon a theory that the lunatic had no will, hence can form no design nor have any intent. It is solely upon the ground that where a loss must fall upon one of two persons equally innocent, it must be borne by the one who caused it. To relieve the defendant from liability upon the strength of the above authorities, therefore, we must go to the extent of holding that there can be no recovery in such case if the destruction of the property was in consequence of any act of the assured, unmoved and unprompted by any intent or design, and when such assured was, in legal contemplation, without any will of his own, and hence incapable of forming any design or having any intent to destroy. Is such the law of fire insurance? It is conceded that there is no express stipulation in the policy relieving the company from liability in such case. But it is a maxim of the insurance law of all commercial nations that the assured cannot recover for loss produced by his own wrongful act. *Thompson v. Hopper*, 6 El. & Bl. 191.

"This brings us to the question, whether he can recover if he happens to set fire to the building without any intent or design to injure any one. In the absence of fraud or design, there can be no question but that a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the assured or his servants. *Dobson v. Sotheby*, 1 Moody & M. 90; *Busk v. The Royal Exchange*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 id. 171; *Shaw v. Robberds*, 6 Ad. & E. 75; *Catlin v. Ins. Co.*, 1 Sumn. (U. S.) 434; *Columbian Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Waters v. Ins. Co.*, 11 id. 213; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Nelson v. Ins. Co.*, 8 Cush. (Mass.) 477; *Gates v. Ins. Co.*, 5 N. Y. 469; *Matthews v. Ins. Co.*, 11 id. 14; *Huckins v. Ins. Co.*, 31 N. H. 247; *Johnson v. Ins. Co.*, 4 Allen (Mass.), 388; *Mickey v. Ins. Co.*, 35 Iowa, 174; s. c. 14 Am. Rep. 494; *Cumberland v. Douglas*, 58 Penn. St. 423; *National Ins. Co. v. Webster*, 83 Ill. 470; *Gove v. Ins. Co.*, 48 N. H. 41; s. c. 2 Am. Rep. 168.

"In *Dobson v. Sotheby*, *ante*, Lord TENTERDEN, C. J., said that 'one of the great objects of insuring is security against the negligence of servants and workmen.' In *Shaw v. Robberds*, *ante*, Lord DENMAN, C. J., reiterated the same doctrine, and added: 'But it is argued that

there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such distinction; and are of opinion that, in the absence of all fraud, the proximate cause of the loss only is to be looked to.'

"In *Gates v. Ins. Co.*, 5 N. Y. 469, the opinion of the court states that 'there can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants and others, and therefore the simple fact of negligence in either, however great in degree, has never been held to be a defence in such policy.'

"In *Mickey v. Ins. Co.*, 35 Iowa, 174, the stove-pipe passed from below through the floor of the second story. The pipe in the second story was removed and a bed placed over the hole by the assured's wife, with the intention of removing the stove below, but which was not done. Subsequently, the weather becoming colder, she made a fire in the stove, without thinking of the removed pipe and the bed above. The result was that the house was consumed, and the company was held liable.

"In *Cumberland v. Douglas*, 58 Penn. St. 423, Mr. Justice STORY said: 'A fire policy is a protection against fire caused by the assured's own negligence, unless the negligence amounts to fraud.'

"In *Breasted v. Farmers' L. & T. Co.*, 8 N. Y. 306, it was, as here, urged in an action on a life insurance policy, 'that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception (if he shall die by his own hand) in the policy. That conclusion is not a legitimate deduction from the premises. . . . A death by accident, and a death by the party's own hand, when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind.'

"Of course, negligence involves a want of care in one who ought to bestow care. It is an omission of duty. But the law imposes no duty — no obligation of care — upon one who has no control over his mental faculties, and hence no control over his physical action. Being under no obligation of care, and under no restraint of duty, and incapable of exercising either, it would be inapt, if not inaccurate, to say that by his omissions an insane person was guilty of negligence. Since burning through the negligence of an insured who is sane does not relieve the company from liability, for a much stronger reason the same act by one who is incapable of care would not. But while the negligent burning by the assured of his own property does not relieve the company from liability, yet the negligent burning of another person's property would subject him to damages on the ground of negligence. So, while the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject

such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice GIBSON, *ante*, 'on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'

"For the reasons given, it follows as a logical sequence that the non-liability of a fire insurance company cannot be predicated upon the fact that the act of burning by the assured, if done to the property of another instead of his own, would have made him liable in damages. The authorities holding a lunatic liable for the actual damages occasioned by his torts, therefore, furnish no ground for relieving the defendant from liability in the case before us. The act of burning the property of another necessarily destroys the property burned, and injures the owner to the extent of its value. But the act of burning one's own property does not necessarily injure an insurance company. Whether it does or not depends upon whether the company has, for the time being, assumed the risk of such burning. It is because the company for a consideration paid, has, for the time being, assumed the risk of burning, and hence relieved the owner from such risk, that the liability continues, even where the burning is by the assured's own negligence, or that of his agents or servants. Such policy covers all risks of loss from fire not excepted therefrom, nor affected by the intent, design, or procurement of the assured. Such being the risk which the defendant here by its contract expressly assumed, it cannot be relieved therefrom because the assured burned the property, if it is made to appear that at the time of such burning the assured was incapable of forming a design or intention to injure.

"Counsel for the defendant concedes that if the assured was insane at the time, then he could not be guilty of a crime, nor liable for a tort wherein the intent is a necessary ingredient. The authorities cited by him fully support this concession, and hold that a lunatic 'is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent.' The same authorities substantially hold that a lunatic has, properly, no will, but acts without design, and is influenced by no motive. Can the act of such a person, even in the burning of his own property, relieve an insurance company from a risk which he has paid it for assuming?

"In *Gove v. Ins. Co.*, 48 N. H. 41, the wife of the assured, while insane and alone in the house, burned his buildings, and it was there held that 'the defendants will be liable for the loss, unless they can show actual design, or such a degree of negligence and carelessness on the part of the husband as will evince a corrupt design or a fraudulent purpose on his part.' After citing authorities indirectly bearing upon the question, the learned judge, giving the opinion of the court in that case, said: 'It appears to us that it would be a misnomer of terms that she, being admitted to be in this state (insane), could so far control her reasoning powers as to be able to plan or design the act done by her beforehand, in

such a manner as to render herself responsible as a moral agent. The word "insane" implies unsoundness or derangement of mind or intellect, not a mere temporary or slight delirium which might be occasioned by fever or accident; and we cannot attach moral accountability to a wrongful act admitted to be done by an insane person.'

"The court then considered the question whether the company was relieved by the husband's negligence in leaving his wife alone in the house while in the condition stated, and concluded that it was not. Applying to that case the rule in respect to negligence sanctioned by Lord DENMAN, *ante*, that there is no distinction between the act of the assured and his servants, and assuming that a wife left by her husband alone and in charge of his house is, as to its care and custody, the servant if not the agent of the husband, it follows that if such burning by her while insane will not relieve the company, then neither would such burning by him while insane relieve the company. Of course, such act of burning by such insane wife was not, under the authorities cited, a criminal act, but at most a tort committed without any design or intent to injure, and by one incapable of controlling her reasoning powers, and hence incapable of planning or designing such act in advance, or comprehending its consequences, especially to the insurance company. Such burning by such insane wife, being a mere tort of the character indicated, was therefore imputable to the husband, for it is well settled that the husband is liable for the torts of his wife: *Head v. Briscoe*, 5 C. & P. 484; *Heckle v. Lurvey*, 101 Mass. 344; s. c. 3 Am. Rep. 366; *Fowler v. Chichester*, 26 Ohio St. 9; *Ball v. Bennett*, 21 Ind. 427; *Brazil v. Moran*, 8 Minn. 236; *Hildreth v. Camp*, 41 N. J. L. 306; and he may be arrested therefor. *Solomon v. Wass*, 2 Hilt. (N. Y. C. P.) 179; *Schaus v. Putscher*, 25 How. Pr. (N. Y.) 463.

"Such being the law, it is evident that had such insane wife burned the house of a neighbor instead of the house of her husband, the husband would, on the principle of the authorities cited, have been liable for the tort; but having burned her husband's house, and such risk of burning having, for value received, been expressly assumed by the insurance company for the very purpose of relieving the assured therefrom, it would seem that the case was rightly decided. Whether the criminal act of intentional burning by a sane wife, without the knowledge, privity, or consent of the husband, would relieve the company from liability to him, need not be here considered.

"In the recent case of *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. 561; s. c. 29 Eng. (Moak's) 710, the company sought to cancel the policy held by the husband for such act of criminal burning by the wife, but a demurrer to the bill was sustained. It was there observed that 'the loss or damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against. Now, if it is such a loss, an attempt by the company to enforce against the

husband a return indemnity or reimbursement is at variance with the very substance of their undertaking to indemnify him. If, on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses covered by the policy, then this action is as wholly misconceived, unnecessary, and unfounded as if the loss had been caused by any other risk not covered by the policy.' The court continued, and gave opinion upon the 'real and substantial contention on the part of the insurance company,' although conceding that it did not and could not arise in the case, as follows: 'I have no hesitation in saying that it appears to me to be upon principle perfectly clear and free from doubt that such a loss would be covered by an ordinary policy against loss caused by fire. Under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself, or some one acting with his privity and consent. In order to escape from responsibility for such a loss as the present, the company ought to introduce into their policy an express exception.'

"The substance of the decisions seems to be that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy, and such as are caused by the voluntary act, assent, procurement, or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance.

"In *Horn v. Life Ins. Co.*, 7 Jur. N. S. 673, Vice Chancellor Wood said: 'It appears to me clear that where there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, that policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity.' This seems to be the acknowledged law of life insurance. *May on Ins.*, § 323. Such being the law of life insurance, a clause is usually inserted in the policy to the effect that the insurer will not be liable in case the insured should 'die by suicide, felonious or otherwise, sane or insane.' But even then these words are only held to include cases of intentional self-destruction, and not unintentional or accidental death, though brought about by acts of the deceased, involving negligence or carelessness. *Pierce v. Travellers' Ins. Co.*, 34 Wis. 389.

"In *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414, it was held that suicide by the insured while 'in a fit of insanity which overpowered his consciousness, reason, and will,' did not come within the clause exempting the company in case the assured should 'die by his own hand or act.' See also *Penfold v. Life Ins. Co.*, 85 N. Y. 317; s. c. 39 Am. Rep. 630, and cases cited by counsel for the plaintiff. But, as already suggested, in the policy before us there is no exemption from liability in case the assured should burn the property feloniously or otherwise, sane or insane, nor anything of that nature.

“For the reasons given we must hold that where, as here, there is nothing in the policy to the contrary, the insurance company is not relieved from liability because the property was burned by the assured while in a state of insanity, nor unless the burning was caused by the voluntary act, assent, procurement, or design of the assured. What has already been said in regard to the charge of the court to the jury renders it unnecessary to apply the principle there suggested to the alleged error in excluding the expert testimony, as the same ruling is not likely to be repeated.

“The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.”

NOTE 76. Notice and Proofs of Loss.—Where the policy requires that notice of loss shall be given forthwith immediately, &c., such notice is sufficient if given with reasonable diligence in view of the circumstances. *Edwards v. Lycoming Ins. Co.*, 78 Penn. St. 378; *Beatty v. Lycoming Ins. Co.*, 66 id. 9; *Peoria, &c. Ins. Co. v. Lewis*, 18 Ill. 553; *Cushaw v. N. W. Ins. Co.*, 5 Biss. (U. S. C. C.) 476; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 478; *Trask v. Ins. Co.*, 29 Penn. St. 198.

But if proofs are furnished which are defective, such defects are waived by a retention of the proofs by the company without objection. *McBride v. Republic Ins. Co.*, 30 Wis. 562; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 419; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 71; *McMasters v. Western Mut. Ins. Co.*, 25 Wend. (N. Y.) 382; *Ætna Ins. Co. v. Tyler*, 16 id. 401; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176; *Warner v. Peoria, &c. Ins. Co.*, 14 Wis. 318; *Home Ins. Co. v. Cohen*, 20 Gratt. (Va.) 312; *Imperial Ins. Co. v. Murray*, 73 Penn. St. 13; *St. Louis Ins. Co. v. Kyle*, *ante*; *Gt. Western Ins. Co. v. Staudin*, 26 Ill. 360; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Germania Ins. Co. v. Curran*, 8 Kan. 9; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Lycoming Ins. Co. v. Dunmore*, 75 Ill. 14; *Van Deusen v. Charter Oak Ins. Co.*, 1 Robt. (N. Y.) 57; *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50; *Edwards v. Travellers' Life Ins. Co.*, 20 Fed. Rep. 661; *Moseley v. Vt. Mut. F. Ins. Co.*, 55 Vt. 142; *Susquehanna, &c. Ins. Co. v. Staats*, 102 Penn. St. 529; *McPike v. Western Assurance Co.*, 61 Miss. 37; *Cedar Rapids Ins. Co. v. Shrimp*, 16 Ill. App. 248; *Boice v. Thames, &c. Ins. Co.*, 38 Hun (N. Y.), 246; *Lebanon Mut. Ins. Co. v. Erb*, 112 Penn. St. 149; *North British, &c. Ins. Co. v. Felrath*, 77 Ala. 194; *Zeilke v. London Assurance Co.*, 64 Wis. 442; *Covenant Mut. Benefit Assn. v. Spies*, 114 Ill. 463; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Johnson v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315; *Underwood v. Farmers', &c. Ins. Co.*, 57 N. Y. 500; *Cumberland Ins. Co. v. Schell*, 29 Penn. St. 31; *Planters' Ins. Co. v. Deford*, 38 Md. 382; *Nothank v. Travelers' Ins. Co.*,

4 Bis. (U. S. C. C.) 357; *Blake v. Exchange Ins. Co.*, 12 Gray (Mass.), 265; *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257; *Bumstead v. Dividend Ins. Co.*, 12 N. Y. 81; *Boynton v. Clinton Ins. Co.*, 16 Barb. (N. Y.) 254; *Underhill v. Agawam Ins. Co.*, 6 Cush. (Mass.) 440; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Rathbone v. City F. Ins. Co.*, 31 Conn. 193; *Thwing v. Gt. Western Ins. Co.*, 111 Mass. 93; *Grave v. Washington, &c. Ins. Co.*, 12 Allen (Mass.) 391; *Basch v. Humboldt Ins. Co.*, 33 N. J. L. 429; *Marsden v. Phenix Ins. Co.*, 1 S. C. 24; *Swan v. Liverpool, &c. Ins. Co.*, 52 Miss. 704; *Bilborough v. Metropolis Ins. Co.*, 5 Duer (N. Y.), 587; *Savage v. Corn Exchange Ins. Co.*, 4 Bos. (N. Y.) 1; *Bryan v. Rising Sun Ins. Co.*, 20 Ind. 103; *Priest v. Citizens' Ins. Co.*, 3 Allen (Mass.), 604; *Kimball v. Hamilton Ins. Co.*, 8 Bos. (N. Y.) 495.

Repudiating all liability under the policy while there is yet time for the assured to comply with the condition as to furnishing proofs of loss, upon the ground that the assured has failed to comply with some other condition of the policy, dispenses with the necessity of producing any proofs of loss, or attempting to comply with this condition, upon the ground that the law does not require a party to perform a condition, when the other party by his acts has rendered such performance nugatory, so that it would be a mere idle ceremony. *Lebanon Mut. Ins. Co. v. Erb*, 112 Penn. St. 149; *Francis v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 404; *Norwich Transp. Co. v. West. Mass. Ins. Co.*, 34 Conn. 561, — *affd.* U. S. 12 Wall. (U. S.) 194; *Williamsburgh City F. Ins. Co. v. Cary*, 83 Ill. 453; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122; *Mutual Ben. Assn. v. Spies*, 114 Ill. 463; *McPike v. Western Assurance Co.*, 61 Miss. 37; *Bennett v. Agricultural Ins. Co.*, 15 Abb. N. C. (N. Y.) 234; *Tayloe v. Merchant's Ins. Co.*, 9 How. (U. S.) 390; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Dean v. Ætna Life Ins. Co.*, 4 T. & C. (N. Y.) 497.

NOTE 77. Forfeiture.—Whenever the assured violates any of the conditions of the policy or fails to perform any condition subsequent therein, he thereby forfeits all his rights under the policy. Thus, if the policy specially provides that “in case the premises shall be left unoccupied” or “shall remain unoccupied” or shall “become vacant,” &c., if the premises are permitted to become vacant within the meaning of the term as employed in the policy, the assured thereby loses all rights under his policy, at least while such condition of the risk exists. *Paine v. Agricultural Ins. Co.*, 5 T. & C. (N. Y.) 619; *Keith v. Quincy, &c. Ins. Co.*, 10 Allen (Mass.), 228; *Cummins v. Agricultural Ins. Co.*, 5 Hun (N. Y.), 554; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Thayer v. Agricultural Ins. Co.*, 5 Hun (N. Y.), 556; *Ashworth v. Builders' Ins. Co.*, 112 Mass. 422; *Whitney v. Black River Ins. Co.*, 9 Hun (N. Y.), 39; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Wustman v. City Fire Ins. Co.*, 15 Wis. 138; *Am. Ins. Co. v. Paddlefield*, 78 Ill. 167; *Sleeper v. Ins. Co.*, 56 N. H. 401; *Kelly v. Worcester F. Ins. Co.*, 97 Mass. 284; *American*

Ins. Co. v. Zaengers, 63 Ill. 464. So where a policy specially provides that in case the building shall be used for *any unlawful purpose* the policy shall be void, the policy is invalidated if the premises are habitually devoted to an unlawful use, whether with or without the knowledge or consent of the assured, as, keeping hotel without a license: *Campbell v. Charter Oak Ins. Co.*, 10 Allen (Mass.), 213; selling liquor therein in violation of law: *Kelly v. Home Ins. Co.*, 97 Mass. 288; letting a building to be used as a house of ill fame: *Com. v. Harrington*, 3 Pick. (Mass.) 36; *Boardman v. Merrimack Ins. Co.*, 8 Cush. (Mass.) 594; or indeed permitting the premises to be used habitually for any unlawful or immoral purpose.

NOTE 78. Double Insurance.—In nearly all fire policies there is a provision that if the assured shall procure other insurance without the assent of the company, the policy shall be void; and in that case, if this condition is violated, the rights of the assured under the policy are forfeited. But it is now generally held that, in order to operate as a breach of this provision, the "other insurance" must be valid and operative; and, if for any cause it is *invalid*, it does not come within the terms of the prohibition. *Thomas v. Builders' Ins. Co.*, 119 Mass. 121; *Jackson v. Mass. Mut. F. Ins. Co.*, 28 Pick. (Mass.) 418; *Hardy v. Union Ins. Co.*, 4 Allen (Mass.), 217; *Clark v. N. E. Mut. F. Ins. Co.*, 6 Cush. (Mass.) 342; *Kimball v. Howard Ins. Co.*, 8 Gray (Mass.), 33; *Stacey v. Franklin F. Ins. Co.*, 2 W. & S. (Penn.) 506; *Gee v. Cheshire Co. Mut. Ins. Co.*, 55 N. H. 265; 20 Am. Rep. 170; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; 11 Am. Rep. 125; *Forbes v. Agawam Ins. Co.*, 9 Cush. (Mass.) 470; *Philbrook v. N. E. Mut. F. Ins. Co.*, 37 Me. 187; *Gale v. Belknap*, 41 N. H. 170; *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486; *Lindley v. Union Ins. Co.*, 65 Me. 368; 20 Am. Rep. 701; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664. A policy conditioned to be void, "if any prior or subsequent insurance is made without the consent of the company indorsed thereon," is not defeated by the taking of a foreign policy, void for want of compliance with statutory regulations. *Rising, &c. Ins. Co. v. Slaughter*, 20 Ind. 520; *Philbrook v. N. E. Mut. F. Ins. Co.*, 37 Me. 137; *Lochlan v. Ætna Ins. Co.*, 4 Allen (N. B.), 173; *Allison v. Phoenix Ins. Co.*, 3 Dill. (U. S. C. C.) 480. See *contra*, *Lackey v. Georgia, &c. Ins. Co.*, 42 Ga. 456; *Bigler v. N. Y. Central Ins. Co.*, 22 N. Y. 402; *David v. Hartford Ins. Co.*, 13 Iowa, 69; *Carpenter v. Providence Ins. Co.*, 4 How. (U. S.) 185; *Ramsay Woolen Cloth Co. v. Mut. Ins. Co.*, 11 Upper Canada (Q. B.), 516. An *interim* receipt for insurance is other insurance. *Hutton v. Beacon Ins. Co.*, 16 U. C. (Q. B.) 316. So the *renewal* of prior insurance, when the assured, at the time of obtaining additional insurance, informed the agent it *would not* be renewed. *Deitz v. Mound City Ins. Co.*, 38 Mo. 85. But the renewal of a prior out-

standing policy is not. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 1. But the procurement of new insurance to the same amount in other companies, in place of previous policies, is other insurance. *Conway Tool Co. v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 144. So other insurance, obtained without the knowledge or consent of the assured, invalidates a prior policy, if the assured subsequently adopts the insurance; and this may be done by accepting the payment of a loss under it. *Dafoe v. Johnstown, &c. Ins. Co.*, 7 U. C. (C. P.) 55. But that cannot be regarded as *other* insurance that is procured by a third person, and to which the assured *has never assented*. *Burton v. Gore Dist., &c. Ins. Co.*, 14 U. C. (Q. B.) 342. Mere notice to the insurer, or his agent, of an *intention* to procure other insurance, is not enough to cause a breach of the condition. To have that effect, *it must be notice of insurance already obtained*. *Healey v. Imperial Ins. Co.*, 5 Nev. 268. Although, if the insurer, upon such notice being given, *assents to the procurement of other insurance*, it is a waiver of notice, although a contrary rule prevails in Massachusetts. *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *Fox v. Phoenix Ins. Co.*, 52 Me. 333; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402; *Allison v. Phoenix Ins. Co.*, Dill. (U. S. C. C.) 480. When a prior policy exists upon the property containing a condition against other insurance, and a subsequent policy is procured without notice, the first policy is thereby invalidated, and the second stands. *Duclos v. Citizens', &c. Ins. Co.*, 23 La. An. 332.

In order to invalidate the policy, the subsequent policy must be such that an action can be successfully predicated thereon for a loss under it. *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 402; *Jackson v. Mass. F. Ins. Co.*, 23 Pick. (Mass.) 418; *Clark v. N. E. Mut. F. Ins. Co.*, 6 Cush. (Mass.) 542; *Hardy v. Union Ins. Co.*, 4 Allen (Mass.), 217. If the policy is *prima facie* valid, the assured must show its invalidity. *Schenck v. Mercer Co. Ins. Co.*, 24 N. J. L. 447; *Bigler v. N. Y. Cent. Ins. Co.*, 20 Barb. (N. Y.) 635. But if invalid *on its face*, it does not avoid the other policies. *Schenck v. Mercer Co. Ins. Co.*, *ante*.

So, too, in order to work a forfeiture, the subsequent insurance *must cover the same property as is covered by the first policy*. *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14. Thus, in *Jones v. Maine Ins. Co.*, 18 Me. 155, a policy upon a store provided that "no person whose property is insured in the company shall be allowed to insure the same, or any other property connected with it, in any other company, or any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect." It was held that this did not prevent the assured from taking out a policy upon the goods in the store in some other company. See, also, to the same effect, *Clark v. Hamilton, &c. Ins. Co.*, 9 Gray (Mass.), 148; *Vase v. Hamilton, &c. Ins. Co.*, 39 Barb. (N. Y.) 302; *Tyler v. Ætna Ins. Co.*, 16 Wend. (N. Y.) 385; *Williams v. Crescent Mut. Ins. Co.*, 15 La. An. 851.

But an insurance upon a *part* of the same property invalidates the first policy. *Kimball v. Howard Ins. Co.*, 8 Gray (Mass.), 33. But see *Illinois, &c. Ins. Co. v. Fix*, 53 Ill. 151, where it was held that where the property in the first policy is separately valued, an insurance upon part of the same policy only invalidates the first policy as to such part.

So, too, in order to invalidate a prior policy by subsequent other insurance, *the interests covered by the policies must be identical*. A policy taken out by a mortgagor is not invalidated by a policy subsequently procured by the mortgagee (*Nichols v. Fayette Ins. Co.*, 1 Allen (Mass.), 63; *Burton v. Gore District Ins. Co.*, 12 Grants Ch. (Ont.) 156, unless the insurance is procured at the instance of the mortgagor, and the premiums are paid by him. *Carpenter v. Providence, &c. Ins. Co.*, 16 Pet. (U. S.) 495; *Holbrook v. American Ins. Co.*, 1 Curtis (U. S. C. C.), 193; *Mussey v. Atlas Ins. Co.*, 14 N. Y. 79.

In *N. E. F. Ins. Co. v. Schettler*, 38 Ill. 166, it was held that where a policy declared that it should be void in case other insurance should "be existing on the property during the continuance of the policy," the fact that other insurance had existed during the time, but which *did not exist at the time of the loss*, did not defeat the insurer's liability under the policy, — the condition being construed as intending merely that such policy should be inoperative only while such other insurance existed.

The fact that the company in which the "other insurance" was made *is insolvent* does not prevent the operation of the forfeiture. The test is not whether the insurance in the other companies *can be collected*, but *whether it is enforceable as a legal claim*. Thus, in *Ryder v. Phoenix Ins. Co.*, 98 Mass. 185, it appeared that at the time when the plaintiffs took out the policy in the defendant company, they held policies in other companies to the full value of the property insured, covering the same risks. One of the companies in which a policy existed had become insolvent, and proceedings for its dissolution had been commenced in New York, but whether dissolution had actually been decreed did not appear, nor was it material, in the view that the court took of the question. The court held that the policy was void in any event, as the validity of the subsequent policy did not depend upon the question whether the prior insurance was worthless, and could not be collected, but upon the question whether, in law, other insurance existed.

In a New York case, a question arose as to the effect upon such a condition by what may be termed a confusion of the property. Thus, the plaintiff had a policy in the defendant company upon a stock of goods at 146 River Street, Troy. The policy contained a condition that "in case any other policy of insurance has been or shall be issued, covering the whole or any portion of the property insured by this company, the policy shall be void, unless notice thereof be given, and the company's assent obtained thereto in writing." The defendants subsequently consented that the goods might be removed to a store adjoining, 148 River Street,

at which place, *at that time*, the plaintiffs had a large stock of similar goods insured in another company, of which fact the defendant was not aware. A loss having occurred, the defendants held that they were not liable because of the insurance upon the goods in No. 148, of which they had no notice. But the court held that there had been no breach of the conditions of the policy, because the two policies did not cover the same goods. *Vose v. Hamilton Mut. Ins. Co.*, 39 Barb. (N. Y.) 302. But a contrary doctrine is held in Louisiana. *Walton v. Louisiana, &c. Ins. Co.*, 2 Rob. (La.) 263. In that case the plaintiff had an insurance upon a stock of goods owned by him and kept in his store, and the policy prohibited other insurance. Subsequently he purchased another similar stock, upon which there was an insurance, and took an assignment of the policy, and the court held that this was "other insurance," and avoided the policy. It is proper to say that where a policy of insurance exists upon a dealer's stock, the risk is not permanent, but fluctuating. It does not apply to the same property, but to property within the class insured, although purchased subsequent to the taking of the policy. The contract impliedly contemplates a changing risk. There is an implied understanding that the insured may sell and buy goods of that class, and the policy shall attach to goods similar in kind which are in the place indicated by the policy at the time of loss; and in this view it would seem that the doctrine of the Louisiana case is clearly correct. The goods are assimilated, and each policy *covers the whole stock*; therefore there is other insurance, within the meaning and intent of the insurer. In an Ohio case (*Washington Ins. Co. v. Hayes*, 17 Ohio St. 432), a doctrine in consonance with that adopted in the Louisiana case was held. In that case the plaintiff was the owner of two stocks of goods in different towns, which were covered by separate policies. The policy upon the goods at A. prohibited other insurance, but the company consented to their removal to B., but not to other insurance. They were moved to B. and mingled with the goods kept there by the plaintiff, which were insured by another policy. It was held that the policy upon the goods removed from A. was avoided by the insurance upon the goods at B. But if the goods are not intermingled, but are kept separate and distinct, it is not other insurance; and whether they were so intermingled as to become one common inseparable stock is a question for the jury. *Peoria, &c. Ins. Co. v. Anapaw*, 45 Ill. 86.

Where there is a latent ambiguity in the prior policy, parol evidence is admissible to show that it was not intended to, and does not cover the property insured by a subsequent policy. *Storer v. Elliott Ins. Co.*, 45 Me. 175.

NOTES 79 and 80. See Wood on Fire Insurance, chap. 16.

NOTE 81. See NOTE 78, *ante*, also, as to effect of assignment without consent of the insurer. *Carroll v. Boston, &c. Ins. Co.*, 8 Mass. 515;

Fogg v. Middlesex Ins. Co., 10 Cush. (Mass.) 327; *Smith v. Saratoga Ins. Co.*, 3 Hill (N. Y.), 508; *Ferree v. Oxford Ins. Co.*, 67 Penn. St. 373. Also see Wood on Fire Insurance, chap. 10.

NOTE 82. Insurable Interest.—The right to insure property against loss from fire is not restricted to the actual legal owner of the property, but extends to, and exists in any person whose relation to the property is such that he may sustain a pecuniary loss from its destruction. Thus, one partner has an insurable interest in a building purchased with partnership funds, although it stands upon lands belonging to another partner: *Peck v. Ins. Co.*, 22 Conn. 575; *Converse v. Citizens' Ins. Co.*, 10 Cush. (Mass.) 37; or to the extent of his interest in any of the property of the firm. *Peoria, &c. Ins. Co. v. Hall*, 12 Mich. 84. So where a person, by statute, or by the common law, or by contract, is liable to another for an injury to, or the loss or destruction by fire, of property of another, whether in his possession or not, he may protect himself against such contingent liability by insurance,—as an innkeeper: *Bunyon on Ins.* 24; a lighterman: *Achard v. Ring*, Q. B., Dec. 19, 1874; *Stewart v. Steamship Co.*, L. R. 8 Q. B. 362; railroad companies: *Eastern R. R. Co. v. Relief Ins. Co.*, 105 Mass.; *Monadnock R. R. Co. v. Manuf. Ins. Co.*, 113 Mass. 74; common carriers of every kind: *Morewood v. Pollock*, 1 E. & E. 743; *Consuley v. Cohen*, 3 B. & Ad. 478; *Chase v. Washington Ins. Co.*, 12 Barb. (N. Y.) 595; a pawnbroker: *Shockell v. West*, 6 Jur. n. s. 95; warehousemen or wharfingers: *Waters v. Monarch Ins. Co.*, 5 El. & Bl. 870; a person having the goods of another in his possession to be repaired or manufactured: *Getchell v. Ætna Ins. Co.*, 14 Allen (Mass.), 325. Or any person having the care or custody of the goods of another, for any purpose, who is liable for their safe keeping, either by law or contract, may protect himself from loss thereof by fire, by insurance. *Chase v. Washington, &c. Ins. Co.*, 12 Barb. (N. Y.) 595; *Getchell v. Ætna Ins. Co.*, 14 Allen (Mass.), 325. A person, who, with the consent of the owner, makes repairs upon a building, *for his own benefit*, has an insurable interest thereon to the extent of his expenditures. *Looney v. Looney*, 116 Mass. 283.

A mere general creditor has no insurable interest in his debtor's property, and an insurance effected upon such an interest would be void, as insurance companies have no power or authority to insure or guarantee the payment of a debt. *Foster v. Van Reed*, 5 Hun (N. Y.), 343. But a surety upon a mortgage debt: *Waring v. Loder*, 53 N. Y. 581; a receiptor of property attached: *Fireman's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311; or any person who has a legal or equitable interest in the specific property insured, and would sustain a pecuniary loss, as an incident to the destruction of the property, may insure the same. One who has permitted another to build a house upon his land, but who has given no permission for its removal, has an insurable interest therein, and this is

not defeated by an agreement that such person may purchase the land, nor even by a consent, — revoked, however, before sale, — that the house might be sold on execution as the personal property of the person building it. *Oakman v. Dorchester Ins. Co.*, 98 Mass. 57.

Where one permits another to use his name in the buying and selling of goods, a policy taken out in the name of both will be good, although the property *in fact* belongs to the one purchasing it. The *liability* of the other is enough to uphold an insurable interest. *Gould v. York, &c. Ins. Co.*, 47 Me. 403.

Where the husband has an interest in the real estate of his wife as tenant by curtesy, and under his right of present occupation, that will uphold a policy thereon during the lifetime of the wife. He has a right to the use and enjoyment of the premises, or their rents and profits, during the joint lives of himself and wife, and is tenant by curtesy at her decease: *Franklin, &c. Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 43; *Harris v. Ins. Co.*, 50 Penn. St. 341; and, where he has a right to the use of her personal property during her life, and takes it at her death, he has an insurable interest therein, as of household furniture: *Clarke v. Fireman's Ins. Co.*, 18 La. 431; and, in either case, he may recover the whole value, and is not restricted to his interest therein. *Fireman's Ins. Co. v. Drake*, *ante*.

A person holding goods or property as security for advances made has an insurable interest therein; and having a qualified property therein, and being bound to restore it to the owner on payment of the advances, he is not restricted to his advances, but may insure for the entire value of the property. *Sutherland v. Pratt*, 11 M. & W. 296; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 607.

Where a person furnishing material for a building or vessel is given a lien thereon for the price, he has an insurable interest in the building or vessel to the extent of his lien. *Franklin, &c. Ins. Co. v. Coates*, 14 Md. 288. A trustee is not in law *bound* to insure, but he may do so, and if he does, the insurance inures to the benefit of his *cestui que trust*, and the *cestui que trust* may insure for himself. One trustee — where there are more than one — may insure for the whole; or if he insures without authority of the other trustees, the others may ratify the same, and the bringing of an action in their names is a sufficient ratification. Money received by a trustee upon a policy covering the trust property, is the property of the *cestui que trust*, and cannot be attached as the money of the trustee upon his debts. *Crawford v. Hunter*, 8 T. R. 13; *White v. Hudson R. Ins. Co.*, 7 How. Pr. (N. Y.) 351; *Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Lerow v. Welworth*, 9 Allen (Mass.), 382.

Many persons may have an insurable interest in the same property, arising from different sources, and standing upon entirely distinct and different grounds, — as the owner in fee: *French v. Roberts*, 16 N. H. 177; *Allen v. Franklin F. Ins. Co.*, 9 How. Pr. (N. Y.) 501; *Strong v. Manuf.*

Ins. Co., 10 Pick. (Mass.) 40; *Higginson v. Dall*, 13 Mass. 96; *Locks v. N. Am. Ins. Co.*, id. 61; a mortgagee of the same premises: *Holbrook v. American Ins. Co.*, 1 Curtis C. C. (U. S.) 193; *Davis v. Quincy, &c. Ins. Co.*, 10 Allen (Mass.), 113; *Fox v. Phoenix Ins. Co.*, 52 Me. 333; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *Ins. Co. v. Updegraff*, 21 Penn. St. 513; the assignee of a mortgagee: *Ins. Co. v. Woodruff*, 26 N. J. L. 541; a person who is personally responsible for the mortgage debt: *Waring v. Loder*, 53 N. Y. 581; a mechanic erecting buildings thereon under an entire contract, or a material-man for materials: *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Protection Ins. Co. v. Hall*, 16 B. Mon. (Ky.) 411. A mortgagor and mortgagee may each insure the premises for their separate benefit. The mortgagee, however, can only insure to the amount of his claim or debt; and in case of loss, the insurer is entitled to an assignment of his interest, which the mortgagor may insure to the full value, and can recover the same, notwithstanding the mortgage, and the mortgagee is entitled to no benefit therefrom. *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *French v. Rogers*, 16 N. H. 177; *Allen v. Franklin Ins. Co.*, 9 How. Pr. (N. Y.) 501; *Strong v. Manuf. Ins. Co.*, 10 Pick. (Mass.) 40; *Curry v. Commonwealth Ins. Co.*, id. 535. An attaching or levying creditor. *Mickles v. Rochester City Bank*, 11 Paige Ch. (N. Y.) 118; *Mapes v. Coffin*, 5 id. 296; *Herkimer v. Rice*, 27 N. Y. 163; *Springfield F. & M. Ins. Co. v. Allen*, 43 id. 389. A sheriff, or his deputy, has an insurable interest in the property attached or levied upon by them. In case of the deputy, however, the insurance should be in the name of the sheriff; but it seems that the expense cannot be taxed against the parties. *White v. Madison*, 26 N. Y. 117; *Burke v. Brig M. P. Rich*, 1 Cliff. (U. S.) 509. And where, by law, a judgment is a lien upon real estate, a judgment creditor, even though execution was not issued. *Rohrback v. Germania F. Ins. Co.*, 62 N. Y. 47; *Shotwell v. Jefferson Ins. Co.*, 5 Bos. (N. Y.) 247; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *M'Givney v. Phoenix Ins. Co.*, 1 Wend. (N. Y.) 85. A person in possession under a contract to purchase, or who has an equitable interest in the estate. *Rohrback v. Ætna Ins. Co.*, 1 T. & C. (N. Y.) 339; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354. An executor in the estate of his intestate, even where by law the title vests in the heirs, he holding in trust for the beneficiaries under the will or by distribution. *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Herkimer v. Rice*, *ante*; *Phelps v. Gebhard*, 9 Bos. (N. Y.) 504. An administrator, where the personal estate is insufficient to pay the debts: *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; but when the personalty is insufficient *quære?* *Beach v. Bowery Ins. Co.*, 8 Abb. Pr. (N. Y.) 261 *n.*

A tenant for a term has an insurable interest to the extent of the value of his leasehold interest: *New York v. Hamilton Ins. Co.*, 10 Bos. (N. Y.) 537; and a tenant who erects buildings under a right to remove them, may insure them as his own. *Hope, &c. Ins. Co. v. Brolaskey*,

35 Penn. St. 282. A tenant by curtesy or dower. *Harris v. York, &c. Ins. Co.*, 50 Penn. St. 341; *Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 4. A tenant in tail. *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535. A married woman in her own estate, and her husband, where by law he is given a present interest therein. *Mutual Ins. Co. v. Deale*, 18 Md. 26.

Where the plaintiff's wife was the owner of real estate in her own right, and two days after her marriage, in consideration of her indebtedness to him before her marriage, executed to him a paper of the following tenor: "I do hereby certify that I owe to J. Rohrback (the husband) the sum of \$700, and the sum of \$25, for each and every month from July 14th, 1863, and for every month he may live with me henceforth, without any deduction whatever, which amount shall be a lien upon my property." And the husband procured an insurance upon the property. It was held, in an action upon the policy, under the statute of New York relative to married women, that this created a lien upon her property that constituted a sufficient insurable interest: *Rohrback v. Aetna Ins. Co.*, 1 T. & C. (N. Y.) 339; but if the husband, having no present legal or equitable interest therein, takes a policy in his own name, it is bad. *Eminence, &c. Ins. Co. v. Jesse*, 1 Met. (Ky.) 523. Or, indeed, any person who has a certain, definite, or fixed interest in the property, so that an injury thereto or destruction thereof would result in pecuniary loss to him as a purchaser under execution before a conveyance has been made to him. *Aetna, &c. Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139; *Herkimer v. Rice, ante*; *Rohrback v. Germania F. Ins. Co., ante*.

A receiptor of property attached, or any person who, at the request of the owner, becomes security for its return to the officer seizing or attaching it. *Fireman's Ins. Co. v. Powell*, 16 B. Mon. (Ky.) 311.

An agent, bailee, trustee, or any person having the custody of property for another, who is responsible for its safe return. *Aetna Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Graham v. Fireman's Ins. Co.* 2 Dis. (Ohio) 255.

One partner to the extent of his interest in the property of the firm: *Converse v. Citizen's Mut. Ins. Co.*, 10 Cush. (Mass.) 37; *Ohl v. Eagle Ins. Co.*, 4 Mas. (U. S.) 172; and a policy in the name of one partner will only cover his legal interest therein: *Bailey v. Hope Ins. Co.*, 56 Me. 474; unless through ignorance, fraud, or mistake on the part of the insurer, the policy was issued in the name of one owner, when it should have issued in the name of all. *Manhattan Ins. Co. v. Webster*, 59 Penn. St. 227. Even where the partnership is merely nominal, and the business is really carried on for the benefit of one of them, a policy may be taken out in the name of the firm, because in such a case, all the persons who permit their names to be used as partners are liable for the debts of the firm, and therefore have an interest in the preservation of the property. *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504.

A person who has an interest in the profits of property, or in the cargo of a ship, may insure the same. *Patapsco Ins. Co. v. Coulter*, 2 Pet. (U. S.) 222; *New York Ins. Co. v. Robinson*, 1 Johns. (N. Y.) 616. But when profits are insured it must be *qua profits*: *Sun Fire Office v. Wright*, 3 N. & M. 819; *Ben. F. I. C.* 449; *Leonards v. Phoenix Ins. Co.*, 2 Rob. (La.) 131; *Elmaker v. Franklin Ins. Co.*, 5 Penn. St. 183; *Niblo v. N. A. Ins. Co.*, 1 Sandf. (N. Y.) 551; *Menzies v. N. British Ins. Co.*, 9 C. C. S. (Sc.) 694. But the profits need not be specifically defined. It is enough if the policy covers the *profits as on profits* in connection with an insurance on a business of any kind. *Eyre v. Glover*, 16 East, 218. In ascertaining the profits, they are to be treated as a mere excrescence upon the value of the goods *beyond prime cost*. The gain over the cost. Lord ELLENBOROUGH in *Eyre v. Glover*, *ante*.

In personal property, the owner has an insurable interest as a matter of course, so also has a consignee thereof. *Parks v. General Interest Assurance Co.*, 5 Pick. (Mass.) 34. A consignee generally cannot insure beyond the extent of his personal interest, which is the probable amount of commissions that will inure to him from the sale of the goods; but if he is directed by his principals to insure the goods, he may take a policy for their value, for his own protection, he acting as trustee for the owners, and in an action upon the policy, these facts are sufficient to establish his insurable interest. *Shaw v. Ætna Ins. Co.*, 49 Mo. 578. The carrier: *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; *Chase v. Washington, &c. Ins. Co.* 4 Bos. (N. Y.) 1. A commission merchant: *Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.) 84; *Putnam v. Mercantile Mut. Ins. Co.*, 5 Met. (Mass.) 386. Both the vendor and vendee in cases where the sale is conditional, and the title is not passed absolutely. *Tallman v. Atlantic F. & M. Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 345; *Kenness v. Clarkson*, 1 Johns. (N. Y.) 385; *M'Gevney v. Phoenix Ins. Co.*, 1 Wend. (N. Y.) 85; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Shotwell v. Jefferson Ins. Co.*, 5 Bos. (N. Y.) 247; *Ayers v. Hartford Ins. Co.*, 17 Iowa, 176. Thus, the vendor in a contract of sale of a factory and machinery who retained the legal title until payment of the purchase, was held to have an insurable interest both in the building and machinery, and his interest was held to be a legal and not an equitable interest: *Wood v. N. Western Ins. Co.*, 46 N. Y. 421; but when the title absolutely passes, the interest ends: *Stuart v. Columbian Ins. Co.*, 2 Cr. C. C. (U. S.) 442. An attaching creditor. *Mickles v. Rochester City Bank*, *ante*; *Mapes v. Coffin*, *ante*; *Springfield F. & M. Ins. Co. v. Allen*, *ante*.

So it is held that the master of a vessel who is entitled to primage on freight, has an insurable interest to the extent of such primage. *Pedrick v. Fisher*, 1 Sprague, 565. (*Primage* is a duty at the water side due to the master of a ship, and the mariners, for the use of the cables and ropes, to discharge the goods of the merchant, and to the mariners, for lading and unlading in any port or haven. 3 Tomlin's Law Dic. 215.)

So, too, the master of a vessel, although in fact having no *property* in the cargo, yet, being the legal owner of the whole cargo, and the equitable owner of a part of it, has an insurable interest in the whole. *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151.

Some question has been made whether a judgment creditor has an insurable interest in the real estate or property of his debtor. If an execution has been issued, and a levy made, there is no question but that such an interest exists in the property levied upon, at least in the sheriff or officer making the levy, where he is responsible for the safe keeping of the property, if not in the creditors themselves. But there can be no question but that the creditors under such execution, as such, have an insurable interest in the property: *Mickles v. Rochester City Bank*, 11 Paige Ch. (N. Y.) 118; *Mapes v. Coffin*, 5 id. 296; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; and the fact that the sheriff is liable to them for any loss that might arise from the destruction of the property would not divest them of that right, as they have a right to rely upon the property itself to liquidate their claims, and are not compelled to pursue a personal remedy. *STORY, J.*, in *Hancox v. Fishing*, 3 Sumn. (U. S.) 132.

NOTE 83. Rebuilding. — The insurer, unless provision is made therefor in the policy, is bound to pay the loss in money, and cannot reinstate the building or replace the property destroyed by other property of the same kind and value. *Com. Ins. Co. v. Sennett*, 37 Penn. St. 205. In *Wallace v. Ins. Co.*, 37 Penn. St. 205, *PORTER, J.*, says, in reference to the claim of insurers to rebuild, when the policy is silent upon that question. "No usage is found to sanction such a pretension. There is no law which authorizes it. The contract makes no mention of it, on the contrary it stipulates that the loss shall be paid in money. It is true that rebuilding might in some cases be an indemnity for the loss. It would perhaps have been so in this instance; but then, *it was not the indemnity the insured paid for*, and we are at a loss to conceive how, on policies where such a right is not expressly affirmed, it could be supposed one of the parties had a right to change the agreement, and substitute one mode of performance for another." Immediately upon the happening of the loss, the loss of the assured, to the extent of the amount insured, becomes a debt against the company, which it is bound to discharge in the same manner as other debts are discharged. But if the insurer, as he may, stipulates to pay the loss in a particular way, he is only bound to pay in that mode; and if he stipulates to reinstate the building, or replace the property in value or kind, he must be permitted to do so; and if the assured refuses to receive the indemnity for his loss, in the mode provided, he can recover nothing upon the policy. Thus, where a policy provided that the insurer, in case of loss or damage to the building, might rebuild or repair the building if he elected so to do within thirty days after loss, *and the assured immediately after loss commenced rebuilding, but before the*

thirty days had elapsed the insurer gave notice of an intention to rebuild, which the assured refused to permit them to do, it was held that he could maintain no action upon the policy for the loss. *Beals v. Home Ins. Co.*, 36 N. Y. 522; *N. Y. F. Ins. Co. v. Delevan*, 8 Paige Ch. (N. Y.) 418.

The right to reinstate the property must be exercised in the mode, and notice of his intention to do so given within the time prescribed in the policy, or it is lost, and if *after* such right has lapsed, by a failure to make his election within the time prescribed, the insurer goes on and rebuilds or repairs the premises, — non-compliance with the policy, in respect to notice, &c., not having been waived by the assured, — he is bound to pay the loss to the insured in money, notwithstanding the reinstatement of the property by him, and is entitled to no deduction from the amount of the loss in consequence of such new building or repairs. *North American Ins. Co. v. Hope*, 53 Ill. 75. Thus in the case last cited, the policy contained a reservation of a right to reinstate the property within thirty days after loss. Notice of loss was served by the assured upon the local agent May 6th, and notice of an intention to repair was not given until the *middle* of June. The insurers, after giving such notice, went on and made repairs to the amount of about \$150. The assured never assented to the making of such repairs, and in an action upon the policy to recover for the loss, it was held by the court that no deduction could be made from the amount of the actual loss, for the repairs made by the assured, and a verdict for \$385.75 was sustained.

When the insurer attempts to rebuild or repair the property, but fails to complete his work, or performs it defectively, he is liable for the *actual damage*, and is not entitled to any deduction for a difference between old and new. That is, the fact that the building he has erected is *new*, while the one destroyed was old, is not to be considered by the jury, but the difference between the value of the building as erected and what its value would have been if properly erected, is the measure of recovery. *Brinley v. National Ins. Co.*, 11 Met. (Mass.) 195; *Parker v. Eagle Ins. Co.*, 9 Gray (Mass.), 152. But in such a case, *even though the insurer is proceeding improperly, or with unreasonable delay*, a court of equity will not interfere to restrain the completion of the work, but will leave the assured to his remedy for damages. *Home Ins. Co. v. Thompson*, *ante*. It has been held in New York, *Morrell v. Irving Ins. Co.*, 33 N. Y. 429, that when an insurer, under such a clause in the policy, signifies his intention to rebuild, and *enters upon performance*, the insurance contract is thereby converted into a building contract, and the assured is entitled to recover for non-performance, precisely the same as against any other contractor, *without any reference to the sum insured*.

When the insurer elects to reinstate the property, and gives notice thereof to the insured, it is held *that he is not excused from doing so, because performance has become impossible*. *Brown v. Royal Ins. Co.*,

ante; *Brady v. N. W. Ins. Co., ante*. Nor will he be excused from paying the entire amount of the loss. *Brady v. N. W. Ins. Co., ante*. An election to rebuild operates as a waiver of all defences except fraud or mistake. *Bersche v. Globe Mut. Ins. Co., 31 Mo. 546*. In any event where a policy contains a provision that the insurer may, if he elects to do so, rebuild or repair the property, the service of a notice of an intention to rebuild, if it does not operate as an absolute contract to do so, so that the insured may sue for a breach thereof, yet it does bind the insurer to rebuild within a reasonable time, or upon failure to do so the insured may sue for and recover the amount of the policy and interest, and the fair rental value of the land during the time of the delay caused by the act of the company, upon the ground that, during the period, the insured is prevented from building, and, thus deprived of the beneficial use of the ground, *Home Mut. Ins. Co. v. Garfield, 60 Ill. 124*, he is entitled to indemnity. The right is a condition *subsequent*, and the assured, in his declaration, need not negative the performance of it. *Ætna Ins. Co. v. Phelps, 27 Ill. 71*.

NOTE 84. Interest sufficient to sustain Life Policy.—The rules in this country relative to the interest requisite to sustain an insurance upon a person's life are far more liberal than in England; and an actual *pecuniary* interest is by no means essential, *Lord v. Dall, 12 Mass. 115*, except in the case of an insurance by a creditor upon the life of his debtor; nor is it necessary that the name of the person interested should be inserted in the policy.

In all cases, however, where, as stated in the text, a policy would be sustained in England, the policy would be sustained here; but our courts go much farther, and any person *who has a reasonable prospect of advantage from the continuance of the life insured* has an insurable interest therein. *Lord v. Dall, ante*; *Loomis v. Eagle Life, &c. Ins. Co., 6 Gray (Mass.), 396*; *Trenton Mut. Life, &c. Ins. Co. v. Johnson, 24 N. J. L. 577*; *St. John v. Am. Mut. Life Ins. Co., 13 N. Y. 31*; *Whitney v. Ind. Mut. Ins. Co., 15 Ind. 297*; *Bevin v. Conn. Mut. Life Ins. Co., 23 Conn. 244*; *Miller v. Eagle Life, &c. Ins. Co., 2 E. D. Smith (N. Y. C. P.), 268*. And if such an interest existed when the policy was issued, the contract remains good, although it did not exist at the time of death, as where a wife before the death of the husband procured an absolute divorce. *Conn. Mut. Life Ins. Co. v. Shaeffer, 94 U. S. 457*. See also, to the same effect, *Dalby v. India, &c. Life Assur. Co., 15 C. B. 364*.

The contract is in no sense one of indemnity, *Miller v. Eagle, &c. Ins. Co., ante*; *Phenix Mut. Life Ins. Co. v. Bailey, 13 Wall. (U. S.) 616*, as it is utterly impossible to estimate the real value of a human life. A policy of life insurance is a mere contract to pay a certain fixed sum in case of the death of the person upon whose life it is issued, in consideration of the premium paid; and in an action to recover the sum named therein,

no evidence as to the value of the life insured is required. All such policies are valued. In the earliest case, involving the question of insurable interest, or indeed of the validity of life insurance policies, tried in our courts, *Lord v. Dall*, 12 Mass. 115, it was held that a sister, who had been educated and supported by her brother, had an insurable interest in his life; and in a later case, *France v. Ætna Life Ins. Co.*, 2 Ins. L. J. (U. S. C. C.) 657, it was held that a sister has an insurable interest in the brother's life, although she is married, and in no wise dependent upon him for support, *if he is unmarried and has no issue or parent living*. See this case affirmed in 94 U. S. 561. A grandchild who supports his grandfather has an insurable interest in his life: *Elkhart Mut. Aid, &c. Assoc. v. Houghton*, 103 Ind. 286; a father in the life of his minor child: *Mitchell v. Union Life Ins. Co.*, 45 Me. 184; *Loomis v. Eagle Life Ins. Co.*, 6 Gray (Mass.), 396; a mother in the life of her son: *Rief v. Union Mut. Ins. Co.*, 17 Ins. Ch. 3; a husband *prima facie* in the life of his wife: *Currier v. Continental Life Ins. Co.*, 57 Vt. 496; a creditor in the life of his debtor, to the extent of his debt and the probable interest and expense likely to accrue; a wife in the life of her husband: *Gambo v. Covenant Life Ins. Co.*, 50 Mo. 44; *Baker v. Union Life Ins. Co.*, 43 N. Y. 283, even though subsequently divorced: *McKee v. Phoenix Life Ins. Co.*, 28 Mo. 283; or a woman living with a man as his wife, although not in fact so: *Equitable Life Ins. Co. v. Patterson*, 41 Ga. 338, — see also *Watson v. Centennial Mut. Life Ins. Co.*, 21 Fed. Rep. 698; but it is apprehended that this can only be the rule when the marriage was entered into in good faith, but, for reasons not known to the woman at the time, was in fact illegal.

But if in an application for a policy the beneficiary is stated to be the “*wife*” of the assured, it has been held that the policy is invalid because such representation is a warranty, and, the marriage being illegal, the representation is untrue. *Halabird v. Atlantic Mut. Life Ins. Co.*, 2 Dill. (U. S. C. C.) 166 note. In Illinois, *Johnson v. Van Epps*, 14 Ill. App. 401, it was held that a man may insure his life in favor of a woman who has agreed to give him a home and to pay the premiums on the policy, *and marry him if she could get a divorce*. The ground upon which this case rests must be that the woman became a creditor of the assured because of the benefits which she conferred upon him; otherwise, in a *pecuniary* sense, she had more interest in his death than in his life. In *Rombach v. Piedmont, &c. Life Ins. Co.*, 35 La. An. 233, it was held that a son-in-law had no interest in the life of his mother-in-law; and tested by common experience perhaps this doctrine is well founded. In *Sides v. Knickerbocker Life Ins. Co.*, 16 Fed. Rep. 65, it was held that a tenant of a life tenant has an insurable interest in his landlord's life. It was said that where there is, when the contract is made, an adequate insurable interest to support the policy, the insurer must pay the full amount of insurance according to the contract, without reference to the subse-

quent diminution or cessation of the insurable interest. Where the tenant of a landlord, having only a life interest in the land, insured the landlord's life for the full term of the life assured, he is entitled to recover the face of the policy, regardless of the expiration of the lease, and cannot be limited to the value of the leasehold, either at the time of the death or date of the policy, upon any theory that the contract is one of indemnity, or that any insurance over the interest actually existing at the death is a wagering contract. It may be said, without stopping to enumerate the instances in which policies have been upheld or defeated because of the presence or absence of an insurable interest in the life insured, that the tendency of our courts is in favor of a very liberal policy in this respect, and that while mere relationship is not, perhaps, of itself sufficient to support a policy, yet, *if the beneficiary has any claim upon the assured for support, or otherwise, so that there is any present or prospective advantage of a pecuniary character likely to result to the beneficiary by the continuance of the life insured*, the policy will be upheld. *Hoyt v. N. Y. Life Ins. Co.*, 3 Bos. (N. Y.) 440. It is upon this principle that a father has an insurable interest in the life of a minor child, or a child in the life of his father, a sister in the life of a brother, a *feme sole* in the life of her betrothed: *Chisholm v. National Capital Ins. Co.*, 52 Mo. 213; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 430; a person who makes advances to another, to be paid out of the profits of an enterprise, or from his future earnings: *Miller v. Eagle, &c. Ins. Co.*, *ante*; *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Morrell v. Trenton, &c. Ins. Co.*, 10 Cush. (Mass.) 282; *Trenton, &c. Ins. Co. v. Johnson*, 24 N. J. L. 577; a partner in the life of a co-partner: *Rawles v. Am. Mut. Life Ins. Co.*, 27 N. Y. 282; *Valton v. National, &c. Life Assur. Co.*, 22 Barb. (N. Y.) 9, — *aff'd*, 20 N. Y. 32; an employee in the life of his employer, or of an employer in the life of his employee. *Hebdon v. West*, 3 B. & S. 578; *Miller v. Eagle Life, &c. Co.*, 2 E. D. S. (N. Y. C. P.) 268. Indeed, it was said in one case, *Forbes v. American Life Ins. Co.*, 15 Gray (Mass.), 249, that the only essential inquiry is, whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of human life. A surety on an official bond has an insurable interest in the life of the obligor, and, even though there has never been a breach of the bond, he may recover upon the policy: *Scott v. Dickinson*, 108 Penn. St. 6; and the same rule prevails as to a surety upon a note, or any other obligation, although there is no reason to apprehend that the surety will ever be called upon to pay the note. *Id.*

In the case of a creditor, it seems that it is not essential that the debt should be legally enforceable. Thus, a creditor, upon whose claim the statute of limitations has run, still has an insurable interest in the life of his debtor, because, while the debt is not enforceable, neither is it extinguished; and, as the bar of the statute is a personal privilege which the debtor alone can plead, there is no presumption that he would do so.

Rawls v. Am. Mut. Life Ins. Co., 27 N. Y. 282. So there would seem to be no reason why the creditor of an infant has not an insurable interest in his life to the extent of the debt. *Rivers v. Gregg*, 5 Rich. (S. C.) Eq. 274.

It will not be advisable to enter more fully into a discussion of the doctrine of insurable interest in a life policy, as the doctrine of the cases is not by any means uniform; and in many instances the cases themselves do not bear the evidence of much consideration. No definite rule applicable in all cases can be eliminated from the cases, and it would be useless to attempt to formulate one in the brief space allowed me in this note. It is believed, however, that the rule stated *ante* will generally be found sufficient.

NOTE 85. **Warranties, etc.** See NOTE 87.

NOTE 86. **Fraudulent Misrepresentation and Concealment.** — Life policies, generally, if not always, are issued upon an application made by the assured, and which is referred to and made a part of the policy. In an application certain interrogatories are propounded, and the answers given by the assured thereto are warranties as to the matters to which they relate, and if affirmative, must be strictly true, or if promissory must be literally complied with whether material or not. The question of materiality cannot arise, as the insurer has made it material, and the assured, if he accepts the policy upon its terms, cannot complain. *Campbell v. N. E. L. Ins. Co.*, 98 Mass. 381; *Edington v. Ætna Life Ins. Co.*, 100 N. Y. 536. In *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210, the court says that while warranties are not to be created by construction, their stipulations must be strictly complied with, if they are expressly and in terms declared. And they are material if the parties by their agreement make them so.

Warranties arising from answers to questions propounded in an application will always be construed strictly or liberally for the assured, according to the circumstances and the subject-matter to which they relate. If the inquiry is of such a character that it must be understood that the answer given by the assured is the literal truth, it will be strictly construed. If, however, it is of such a character as to involve the opinion, as well as the knowledge of the assured, then it will be liberally construed, and if his opinion was honestly given, although erroneous, the policy will not be avoided. So the question may be of such a character as only to call for an answer which is substantially, although not literally true, and in that case, if there was not a fraudulent or intentional suppression of an important fact, the policy will not be invalidated.

To illustrate. If, in answer to an inquiry, "Have you ever applied for insurance upon your life before; and with what result?" the applicant answers "Yes, and always successful," when in fact he had previously

made an application which had been rejected, the answer is a breach of warranty which invalidates the policy: *Edington v. Ætna L. Ins. Co.*, *ante*; and this is so, although the assured at the time had forgotten the fact that he had made such former application. The inquiry called for information, which was either within his knowledge or which he might possess, and he was at his peril bound to answer it truly.

If, however, in answer to an inquiry, "Are you now in good health?" the assured answers "Yes," the fact that he is not in perfect physical condition, if he is substantially in good health, as the term is commonly understood, will not defeat the policy. *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293; *Bigelow's L. Ins. Cas.* 455; *Rose v. Star Ins. Co.*, 2 Irish Jurist, o. s. 206; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274.

Therefore, if at the time of answering such an inquiry the applicant had a slight cold, the warranty would not be broken. But if at that time, and for some time prior thereto, the applicant had spitting of blood: *Smith v. Ætna L. Ins. Co.*, 49 N. Y. 211; *Scoles v. Universal L. Ins. Co.*, 42 Cal. 423; *Day v. Mut. Ben. L. Ins. Co.*, 1 Wash. Law Reporter, 22; *Fried v. Royal Ins. Co.*, 47 Barb. (N. Y.) 127; or in fact any *disease* of the presence of which in his system he knew, the policy would be void. So, where the applicant, in answer to an inquiry whether he had ever had rheumatism, answered "No," it was held that the inquiry related to the *disease* of rheumatism, and that the fact that he had a species of rheumatism, which physicians testified was not generally regarded as a disease, did not invalidate the policy.

In *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, it was held that, where an applicant for life insurance is required to answer "yes," or "no" to the question whether he has ever had certain enumerated diseases, including "affection of liver," answers "No," it cannot be contended that his answer is not a fair and true one, although he may have had slight temporary disorders affecting the liver unattended by substantial injury, inconvenience, or prolonged suffering. Nor does he by such an answer withhold information which he should have given. See also *Dreirer v. Continental L. Ins. Co.*, 24 Fed. Rep. 670, where it was held that where an applicant, in answer to a question whether he had had "pneumonia, spitting of blood, &c.," answered "No," when in fact he had on one occasion spit blood, did not avoid the policy.

In *Knickerbocker L. Ins. Co. v. Trefz*, recently decided by the U. S. Ct., in an application for a life insurance policy on the life of T., was this question: "Whether now or formerly, when and how long, and to what degree, subject to or at all affected by any of the following diseases and infirmities?" (Here followed a long list, in alphabetical order, of disorders, beginning with "apoplexy" and ending with "yellow fever," and including "diseases of the brain, disease of the heart.") The answer was, "Never sick." T. was a German, who did not understand English very well. The policy contained a condition forfeiting it if any one of the

answers in the application was untrue. In an action on the policy, after the death of T., it was set up as a defence that T. had once had a sunstroke, and the answer was therefore untrue. The court charged the jury thus: "In considering whether the reply 'never sick' was an untruth of such a character as to avoid the policy, the jury had the right and ought to remember that the applicant was not a native-born citizen, and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him." And also: "It seems to me that in endeavoring to ascertain the truth or falsity of the answer, we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses." It was held that there was no error. To ascertain the meaning of the answer—the meaning the law will affix to it—it is perfectly proper to determine the sense in which the words were used by the speaker, the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by SWAYNE, J., in *Ins. Co. v. Gridley*, 100 U. S. 616: "The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive."

The nature of this written instrument as affected by its form, must be considered in every question of its interpretation. It is not a formal instrument, employing technical language with well-ascertained legal effect, like a deed or a bill of lading, or framed with precision and nicety, as to the choice of phrases to express a certain and definite covenant, which the parties duly advised have entered into with deliberation and in solemn form. It is, on the contrary, a conversation reduced to writing, and the writing done by one only of the parties. The language is colloquial, and in the form of a dialogue: of question and answer. It is in the shape of a deposition, where the party interrogated is giving his testimony, and where the meaning of his statements must be ascertained from his own peculiar use of language. And if the party is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used. It was shown by evidence that T. had frequently stated that he had had a sunstroke. There was other evidence tending to show that he had been merely overcome by the heat. The court submitted it to the jury to say whether or not T. ever did in fact have a sunstroke, properly so called, and whether the attack he did have, sunstroke or not, was a disease of the brain, making the answer untrue. It was held no error. The answer was not untrue unless T. had had a disease of the brain. To establish this it was necessary to prove something more than that he had what he called sunstroke. It was essential to show that he had sunstroke in fact, and that it was such as to constitute disease of the brain. In *Mut. Ben. L. Ins. Co. v. Wise*, 34

Md. 582, the applicant, in answer to inquiry whether he had had any sickness within the last ten years, answered, "Pneumonia in 1862." Within that period he had had "pharyngitis," which is an inflammation of the throat, and when slight, is not regarded as a disease, and the court left it to the jury to say whether or not it was a sickness within the contemplation of the parties.

In *National Bank v. Ins. Co.*, 95 U. S. 678, it was held that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself. See also *Grace v. American Ins. Co.*, 109 U. S. 282. These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk, that is, in matters which are of the essence of the contract. An applicant for life insurance was required to state categorically whether he had ever been afflicted with certain specified diseases. He answered that he had not. Upon an examination of the several clauses of the application, in connection with the policy, it was held to be reasonably clear that the company required, as a condition precedent to a valid contract, nothing more than that the insured would observe good faith toward it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted. In the absence of explicit stipulations requiring such an interpretation, it should not be inferred that the insured took a life policy with the understanding that it should be void, if at any time in the past, he was, whether conscious of the fact or not, afflicted with the diseases, or any one of them, specified in the questions propounded by the company. Such a construction of the contract should be avoided, unless clearly demanded by the established rules governing the interpretation of written instruments. *Moulor v. Life Ins. Co.*, 101 U. S. 708.

In *Grangers' Ins. Co. v. Brown*, 57 Miss. 308, a life insurance company defended an action on a policy, on the ground that the insured had falsely warranted that he had never received any serious personal injury, whereas his skull had been fractured in boyhood and had been

healed by trephining. To prove this, they proposed to disinter his body, after the suit had been pending eighteen months, on the sole testimony of his physician that the deceased had told him that he had been told of such an accident and operation. The court said: "We are not prepared to say that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect. It would be a proceeding repugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives, that they would prefer an abandonment of the suit to a compliance with the order. Without undertaking to define with accuracy what circumstances would justify the making of such an order, we think that a case calling for it was not shown in this instance."

NOTE 87. Warranties and Representations.— There is no better settled rule in the law of insurance, than that all representations made by the assured *material to the risk* must be complied with; therefore in all cases the materiality or immateriality of a representation may be shown, and is a question of fact for the jury. But a *warranty is a part of the contract*, and must be complied with in all respects, and the question as to whether it is material or not, is not open to inquiry. In all cases *where it is agreed that a certain state of facts exists, and forms the basis of the policy*, the truth of that statement is warranted, and the courts have no power to change the contract, and if the statement is false, the policy is avoided, even though in fact the insurer would have more readily accepted risk if the true statement had been given. *Weems v. Standard Co.*, 21 Sc. L. R. 791; *Newcastle F. Ins. Co. v. McMorran*, 3 Dowl. H. L. 255; *Thompson v. Weems*, 9 App. Cas. 671; *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. 244; *McDonald v. Law Union F. & L. Ins. Co.*, L. R. 9 Q. B. 328; *Carson v. Jersey City Ins. Co.*, 44 N. J. L. 300; *Phoenix, &c. Ins. Co. v. Raddin (U. S. C. C.) Bank*, 30 L. Ed. 644; *Cushman v. U. S. Life Ins. Co.*, 63 N. Y. 504.

No particular form of words is necessary to constitute a warranty; it is not necessary that there should be any such formula as "I warrant;" but it is essential that it should appear in some manner that the contract was made upon the faith of the statement which it is claimed constitutes a warranty. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Miles v. Com. Mut. Life Ins. Co.*, 3 Gray (Mass.), 582; *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225; *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72. It is also necessary that the warranty should be contained in the policy, or in some instrument which is made a part of the policy by reference thereto. *Worsley v. Wood*,

6 T. R. 710; *Routledge v. Burrell*, 1 H. Bl. 255. An indorsement upon the back of the policy, or on its margin is sufficient. *Beau v. Stupart*, Doug. 11.

In the case of a warranty or a condition, the only question is, is the answer or statement true? and if not, the policy falls, without any reference to its materiality. *Russell v. Canada Life Co.*, 32 U. C. (C. P.) 256; *London Assurance Co. v. Monsel*, 11 Ch. Div. 363; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Thompson v. Weems*, H. L. 9 App. Cas. 671; *Hartwell v. Alabama, &c. L. Ins. Co.*, 33 La. An. 1353. In such cases the truth of the answer is made material by the contract of the parties, and this is conclusive. *Ætna L. Ins. Co. v. France*, 91 U. S. 510; *Jeffries v. Economical Mut. L. Ins. Co.*, 22 Wall. (U. S.) 42; *Thomson v. Weems*, *ante*; *Campbell v. Middlesex Mut. L. Ins. Co.*, 98 Mass. 381; *Foot v. Ætna L. Ins. Co.*, 61 N. Y. 571; *Miles v. Conn. Mut. L. Ins. Co.*, 3 Gray (Mass.), 582; *Bartean v. Phenix Mut. L. Ins. Co.*, 67 N. Y. 595; *Vose v. Eagle, &c. Ins. Co.*, 6 Cush. (Mass.) 42; *Price v. Phenix Mut. L. Ins. Co.*, 17 Minn. 497; *Day v. Mutual Ben. L. Ins. Co.*, 1 McArthur, 41. But the insurer may by his acts waive the warranty and the forfeiture incident to its breach, and this is the case, when, *knowing* that the statements contained in the application are untrue, it issues a policy thereon and accepts the premium, or receives premiums thereon after it knows of the falsity of the statements. *Appleton v. Phenix Mut. L. Ins. Co.*, 59 N. H. 541; *Morrison v. Wisconsin, &c. L. Ins. Co.*, 59 Wis. 163; *Hadley v. N. H. Fire Ins. Co.*, 55 N. H. 110; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326; *Schwarzbach v. Ohio, &c. Ins. Co.*, 25 W. Va. 622. This doctrine is predicated upon a presumption that the insurer would not issue a policy and receive premiums thereon when it knew that the policy was worthless; as honesty and good faith are always presumed in favor of contracting parties. CLARK, J., in *Ball v. Granite State Mut. Aid Society*, (N. H.) 4 N. E. Rep. 291.

Parties are at liberty to make such contracts as they please, and unless they are illegal or opposed to public policy they must be sustained, although their unwisdom is manifest. The courts are called upon to enforce contracts made by the parties thereto, and not to make new contracts for them. Consequently, where a party, in effecting an insurance upon his life, agrees that if the proposal, answers, and declarations made by him are untrue or fraudulent, the policy shall be null and void. The policy is void if any of the answers or declarations made by him *are untrue*, whether they were material or not. *The parties have made them material*, and it is not the province either of the court or jury to say that they are not so. *Jeffries v. Life Ins. Co.*, 22 Wall. (U. S.) 47; *Ætna L. Ins. Co. v. France*, 91 U. S. 510; *Cazenove v. British Equitable Ass. Co.*, 6 C. B. N. S. 437; 6 Jur. N. S. 826; *Duckett v. Williams*, 2 C. & M. 348; *Price v. Phenix Ins. Co.*, 17 Minn. 497.

In *Jeffries v. Life Ins. Co.*, *ante*, the policy contained the following pro-

visions: "This policy is issued by the company and accepted by the assured on the following express conditions and agreements, which are a part of the contract of insurance. *First*, that the statements and declarations made in the application for said policy, and on the faith of which it was issued, *are in all respects true.*" There was also another condition, that "in case of the violation of the foregoing condition . . . this policy shall become null and void." It appeared that, in answer to a question whether the assured was "married or single," he made the false statement that he was "single;" and in answer to a question "Whether any application had been made to any other company, if so, when?" he answered "*No*," when in fact he had previously made an application to another company and been insured for \$10,000. It was contended by the plaintiff that these answers, although false, did not invalidate the policy, because they were immaterial and did not affect the risk. The court held that it had nothing to do with the question as to whether the answers were material to the risk or not, as the parties had by their contract made them material. HUNT, J., said:—

"The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true. This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, *but as to all statements.* The statements need not come up to the degree of warranties. They may not be representations even, if this term conveys an idea of an affirmation having any technical character. '*Statements and declarations*' is the expression, — what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

"There is no place for the argument either, that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the direct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as is his right to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal."

In such cases, the only questions for the jury are: "Was the representation made?" If so, "was it true?"

Under policies containing such provisions, every representation made by the assured in response to inquiries becomes a warranty. In some of the States by statute, it is provided that representations not relating to the risk shall not vitiate the policy, and that the question as to the materiality of the question shall be for the jury, and in such cases,

as to all policies issued *after* the enactment of the statute, the statute overrides the provisions of the policy in this respect.

NOTE 88. Indisputable Policies.— There are but few companies in this country who issue this class of policies; and if they abide by their contracts, instances in which the effect of the contract would be brought to the attention of the court would be rare.

NOTE 89. Forfeiture of Policies.— In all life insurance policies, the payment of the premium at the times and according to the terms of the policy, is a condition precedent to the policy remaining in force: *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188; *Miller v. Union Central L. Ins. Co.*, 110 Ill. 102; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Bogardus v. N. Y. L. Ins. Co.*, 101 U. S. 328, *Servass v. Weston Mut. Aid Soc.*, 67 Iowa, 86; *Bradley v. Potomac Ins. Co.*, 32 Md. 108; and the fact that the company has been in the habit of giving notice of the time when the premium became due, but failed to do so, in consequence of which the forfeiture arose, will not save the policy; *Mandego v. Centennial Mut. L. Ins. Co.*, 64 Iowa, 134. But *contra*, see *Atty.-General v. Continental L. Ins. Co.*, 33 Hun (N. Y.), 138.

The same rule prevails where the policy is in terms forfeitable for non-payment of the premium, or *any note* at maturity given in whole or in part for a premium. *Baker v. Union L. Ins. Co.*, 43 N. Y. 283; *Roberts v. N. E. L. Ins. Co.*, 1 Disney, Superior Ct. Cincinnati (Ohio) 355; *Catoir American L. Ins. Co.*, 33 N. J. L. 487; *Russum v. St. Louis &c. Ins. Co.*, 1 Mo. App. 238; *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500; *Mason v. Citizens', &c. Ins. Co.*, 10 W. Va. 572; *Shaw v. Berkshire L. Ins. Co.*, 103 Mass. 254; *Security L. Ins. Co. v. Goher*, 50 Ga. 404; *Howe v. Union Mut. L. Ins. Co.*, 80 N. Y. 32; *Atty.-General v. North American L. Ins. Co.*, 80 id. 152; *Moses v. Phenix, &c. Ins. Co.*, 2 Mo. App. 408; *Nedrow v. Farmers' Ins. Co.*, 43 Iowa, 24; *Williams v. Washington L. Ins. Co.*, 31 id. 541; *Patch v. Phenix L. Ins. Co.*, 44 Vt. 481.

But, even though the policy is forfeitable for the non-payment of the premium, yet if a note is taken for a part of the premium, and there is no provision that the policy shall be forfeited if the note is not paid at maturity, the policy will continue in force notwithstanding the note is not paid. *Mut. Ben. L. Ins. Co. v. French*, 30 Ohio St. 240; *N. E. L. Ins. Co. v. Hasbrook*, 32 Ind. 447; *McAllister v. N. E. Mut. L. Ins. Co.*, 101 Mass. 538. And unless the policy provides that it shall be forfeited by non-payment of the premium, even though the charter and by-laws require its annual payment, the non-payment, when due, will not forfeit the policy. *Am. Ins. Co. v. Klink*, 65 Mo. 78; *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones (N. C.), 558.

If no mode of payment is named in the policy, any mode which is accepted by the company is sufficient, as by note: *Inman v. Globe Ins.*

Co. (Ky.), 4 Ins. L. J. 719; Pitt v. Berkshire L. Ins. Co., 100 Mass. 500; or check sent to agent: Taylor v. Merchants' Ins. Co., 9 How. (U. S.) 39; Currier v. Continental Ins. Co., 53 N. H. 84; or a payment in any mode which is accepted by the company or a duly authorized agent: Roberts v. Int. Assur. Soc. London, 42 N. Y. 54; Sands v. N. Y. L. Ins. Co., 50 N. Y. 620. If a premium falls due on Sunday it may be paid at any time before midnight of the next day. Och v. Homestead, &c. Ins. Co., 21 Pitts. C. (Penn.) Leg. J. 98.

The acknowledgment of the receipt of the premium in the policy, or indorsed upon it, is only an admission, which may be contradicted by proof that the premium was not in fact paid. It is *prima facie* evidence of payment only. Baker v. Union Mut. L. Ins. Co., 43 N. Y. 287; Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460; Ins. Co. of Penn. v. Smith, & Whart. (Penn.) 520. The same rule in this respect applies as applies to such clauses in a deed, or indeed any instrument, whether under seal or not, acknowledging the payment of the consideration. McCrea v. Purmort, 16 W. R. 460.

Where payment of the premium upon a certain day is a condition to the continuance of the policy, non-payment at that time invalidates the policy, even though performance was prevented by the act of God. New York L. Ins. Co. v. Statham, 93 U. S. 24. Thus in a New York case, Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276, the policy provided that the policy should be continued in force until the decease of the assured, provided that the premium was paid annually on a certain day. The premium had been regularly paid except the last one. Upon the day when that premium became due the assured was stricken with apoplexy and remained unconscious until the next day, when he died, the premium remaining unpaid. It was held that the policy had lapsed unless performance had been waived; and, it having been admitted upon the trial that it was agreed that if anything should happen to the assured which would prevent his paying the premium on the day it became due, *he would be allowed a reasonable time in which to pay it, and that the policy should remain in force for a reasonable time thereafter*, it was held that if the premium was paid or tendered *within a reasonable time*, the policy remained in force *even though the person whose life was insured thereby had died after the day of payment*. If there was such an agreement between the insurer and the assured as operated as a waiver of the condition, upon or before the day named in the policy, the doctrine of the case as stated above would seem to be well founded, and it would be a question for the jury whether payment was made or tendered *within a reasonable time* after the premium became due. But the English courts have held otherwise, and established the doctrine that any indulgence in this respect given to the assured is subject to the condition *that the payment is made within the life of the assured*. Simpson v. Accidental Death Ins. Co., 2 C. B. N. S. 257; Pritchard v. Merchants', &c. L. Ins. Co., 3 C. B. 624.

But this rule seems to be strained and unwarranted. If the insurer by an agreement of this character has put the assured off his guard, and caused him to relax his diligence as to performance of this condition, it is hardly reasonable to say that his waiver of the condition must be treated as subject to another condition, to wit, that the assured does not die within such reasonable time. If there is a waiver of performance of the condition, and the waiver is not expressly made subject to a condition, the law will not imply a condition, especially where a forfeiture is involved. The insurer may impose any lawful condition, and even though its breach involves a forfeiture, the courts must uphold it, but as the courts do not favor forfeitures, they will *when the party by whose fault they have been incurred has a just and reasonable ground in the agreement or acts of the insurer, to base a reasonable excuse for his default*, enforce the policy notwithstanding the default. *Thompson v. Ins. Co.*, 104 U. S. 260; *Ins. Co. v. Norton*, 96 U. S. 234; *Ins. Co. v. Eggleston*, 96 U. S. 572; *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264; *Phenix Ins. Co. v. Doster*, 106 U. S. 30.

Thus in a case decided by the United States Supreme Court, *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, the policy among other things contained a condition as follows: "*Second, If the said premium shall not be paid on or before twelve o'clock, noon, on the day or days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to agents when they produce receipts signed by the president or secretary, or if the principal of or interest upon any note or other obligation given for the premium upon said policy shall not be paid at the time the same shall become due and payable, then, and in every such case, the company shall not be liable to pay the sum assured, or any part thereof; and said policy shall cease, and be null and void, without notice to any party or parties interested herein, except that the stipulation for a new policy, as hereinbefore provided, shall remain in force,*" and it was held that the company might waive this condition to the policy, and that the condition having been waived by its agent with its knowledge it was bound thereby.

A policy which provides for the payment of an annual premium, conditioned to be void on non-payment, is not an insurance from year to year, as is the case with a common fire policy, but the premium is treated as an annuity, the whole of which is a consideration for the entire assurance for life, and the condition is a condition subsequent, a breach of which invalidates the policy. In such a case, *time* is of the essence of the contract, and a failure to pay works a forfeiture, against which equity cannot relieve the parties: *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24; *Klein v. Ins. Co.*, 104 U. S. 88, unless strict performance of the condition has been waived by the insurer either by an express agreement, or by such a course of conduct as gave the assured a just and reasonable ground to

infer that a forfeiture would not be exacted. *Thompson v. Ins. Co.*, 104 U. S. 252.

Where the policy provides that if notes taken for the whole or a part of the premium are not paid at maturity, the policy shall be void, the condition is a reasonable one, and upon its breach becomes operative to defeat the liability of the company under the policy. It is a part of the contract, and the courts have no power to release the parties therefrom, or to make a new contract for the parties. *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283. And the fact that the company demanded payment of the note after it became due, *which was unsuccessful*, does not operate as a waiver of the forfeiture. *Pitt v. Berkshire L. Ins. Co.*, *ante*; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 290.

NOTE 90. Right to recover back Premium. See *ante* n. 89.

NOTE 91. Waiver of Forfeiture.—Holding the doctrine stated in the text, see *Rockwell v. Mut. L. Ins. Co.*, 20 Wis. 335; *Banton v. Am. Mut. Life Ins. Co.*, 25 Conn. 542; *Hamilton v. Mut., &c. Ins. Co.*, 9 Blatchf. (U. S. C. C.) 234; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; *Am. L. Ins. Co. v. Green*, 57 Ga. 469; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 210. In some cases, it is held that it is immaterial whether the waiver of the forfeiture is made before or after the condition is broken, and the reason for this rule seems to be well grounded. In *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234, **BRADLEY, J.**, says: “Much stress, however, is laid on the fact that the extension claimed to have been given in this case was not given, or applied for, until after the first note became due, and the forfeiture had been actually incurred. But we do not deem this to be material. The evidence does not show that any distinction was made in granting extensions before or after the maturity of the notes. The material question is, whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity, as by one made before. In either case, the legal effect of the indulgence is this: The company say to the insured, ‘Pay your note by such a time, and your policy shall not be forfeited.’ If the insured agrees to do this, and does it, or tenders himself ready to do it, the forfeiture ought not to be exacted. In both cases, the parties mutually act upon the hypothesis of the continued existence of the policy. It is true, if the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass. On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition, on the company’s part, of the continued existence

of the policy, and, consequently, of its election to waive the forfeiture. It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy. Grant that the promise to extend the note is without consideration, and not binding on the contract, — which is perhaps true as well when the promise is made before maturity as when it is made afterwards, — still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension; but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the waiver of the forfeiture, without at least giving to the assured reasonable notice to pay the money."

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. The fact that a policy declares that an agent has no power to waive a forfeiture, or to modify the contract of insurance, is not decisive as to the power of an agent in these respects, and it may be shown that the company has expressly authorized the agent to exercise such powers, or that it has permitted him to do so to such an extent as to be estopped from denying his authority to do so. *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Ins. Co. v. Norton*, 96 U. S. 234; *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 426; *Eclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645. The question as to whether he had such authority is one of fact for the jury. *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207. BRADLEY, J., in delivering the opinion of the court, holding that an extension of the time of payment by an agent who has been permitted by the company to do so, operated as a waiver of the forfeiture says: —

"The material question in this case is, whether, in view of the express provisions of the policy, the evidence introduced by the assured was relevant, and competent to show that the company had authorized its agent to grant indulgence as to the time of paying the premium notes, and waive the forfeiture incurred by their non-payment at maturity; or to show that any valid extension had, in fact, been granted, or the forfeiture of the policy waived.

"The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures.

And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time at its option give them such power. The declaration was only tantamount to a notice to the assured which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that could be done without writing.

“ That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period it allowed them to give an indulgence of ninety days; after that, of sixty, then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments.

“ We think, therefore, that there was no error committed by the court below in admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums, and of notes given for premiums, as indicative of the power given to those agents; nor any error in submitting it to the jury, upon such evidence, to find whether it had or had not authorized its agent to make such extensions; nor in submitting it to them to say whether, if such authority had been given, an extension was made in this case.”

NOTE 92. **Assignment.** — See, holding that, where the policy is payable to the assured, “ his executors, assigns,” &c., and there is no provision in the policy prohibiting an assignment, he may assign it so as to pass his legal title thereto. *N. Y. Life Ins. Co. v. Flack*, 3 Md. 341; *McCord v. Noyes*, 3 Bradf. (N. Y. Surr.) 139; *Getchell v. Maney*, 69 Me. 442; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Palmer v. Merrill*, 6 Cush. (Mass.) 282.

NOTE 93. **Rights of Creditor who insures Debtor's Life.** — See *Morrell v. Trenton Mut. Life, &c. Ins. Co.*, 10 Cush. (Mass.) 282; *Rawls v. Am. Life Ins. Co.*, 27 N. Y. 282; *Am. Life Ins. Co. v. Robertstraw*, 26 Penn. St. 189.

NOTE 94. **Accident Insurance.** — In *Pollock v. U. S. Mut. Accident Assoc.*, 101 Penn. St. 12 W. N. C. 251, there was a condition against liability for “any bodily injury of which there shall be no external or visible sign, . . . or to any death or disability which may have been caused wholly or in part . . . by the taking of poison.” “And no claim shall be made under this certificate when the death or injury may have been caused . . . by suicide (felonious or otherwise, sane or insane), . . . or by self-inflicted injuries, . . . or when death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure.” The deceased came to his death by unintentionally drinking a deadly poison. *Held*, no liability. The court said: “It is admitted that this policy ought to be liberally construed, full justice should be done to the assured, and of two constructions that which is most favorable to him should be adopted. The authorities are clear as to these points, and require no discussion. The difficulty in this case arises from the fact that the words ‘external, violent, and accidental means,’ are qualified and limited by the proviso, which declares that the benefits of the certificate shall not extend ‘to any injury of which there shall be no external or visible sign, . . . nor to any death or disability which may have been caused wholly or in part . . . by taking of poison.’ It is useless to decide whether this death was caused by ‘external, violent, and accidental means,’ while the proviso remains in the certificate or policy. If the death by poison had been intentional, it would either have been by reason of ‘medical treatment,’ or by ‘suicide (felonious or otherwise, sane or insane).’ The words of the certificate, ‘by taking of poison,’ can have no meaning unless intended to reach just such a case as this. The company did not mean to insure against a death produced by the unintentional drinking of poison, and not even to a death produced by ‘external, violent, and accidental means,’ where there shall exist ‘no external or visible sign.’ Two adjudged cases nearest in principle to this, *Bayless v. Travellers’ Ins. Co.*, 14 Blatch. (U. S. C. C.) 143, and *Hill v. Hartford Accidental Ins. Co.*, 22 Hun (N. Y.), 187, both sustain the view we take; even the dissenting opinion in the last cited case contains the principle applied here.” But in *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; 39 Am. Rep. 660, it is held that a policy of life insurance, conditioned to be void if the insured should die by his own hand or act, voluntarily or otherwise, is not avoided by his innocently taking a fatal overdose of medicine while sane.

In *Scheiderer v. Travelers’ Ins. Co.*, 58 Wis. 13; 16 Rep. 158, the plaintiff alleged, in an action on a policy of accident insurance, that while a passenger on a train of cars he fell asleep from weariness and the motion of the car, and while so unconscious he arose from his seat and went to the platform of the car and fell therefrom to the ground, sustaining injury. On demurrer, held, that the complaint stated a cause of action. The court said: “It is not necessary to wander away and get lost in ‘that

wilderness more dark than groves of fir on Huron's shore,' the wilderness of mind, to ascertain the precise condition of the mind of the plaintiff as stated in the complaint when the accident occurred, and it is useless to speculate as to the remote causes of that condition — whether drunkenness, utter prostration, somnambulism, brain disease, or derangement of the faculties — beyond, aside, or in contradiction of what is stated in the complaint. The allegations of the complaint must be taken as true on demurrer, and it must be accepted as true that while he was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, the plaintiff involuntarily arose from his seat and walked unconsciously to the platform of said car, and without fault on his part, fell therefrom to the ground. All this occurred while he was unconscious, and involuntarily, without knowing or realizing what he was doing. These are the strongest words that could be used to negative self-infliction, design, or voluntary exposure, which are the only conditions material to this case which exempt the company from liability. In respect to the causes of this mental condition of the plaintiff it must also be accepted as true that he went to sleep from weariness and the motion of the cars, and never awoke to consciousness or volition until the injury had happened. From these allegations it is evident that the plaintiff was as irresponsible for his actions and conduct as a human being could be from any possible cause, and that is sufficient."

In *Tuttle v. Travellers' Ins. Co.*, 134 Mass. 175, an accident insurance policy provided, among other things, that no claim should be made under it when the death or injury might have happened in consequence of exposure to any obvious or unnecessary danger. It is also made subject to the condition that the party insured is required to use all due diligence for personal safety and protection. The insured was killed when he was running along a railroad track in front of a moving train for the purpose of getting on a train approaching on a parallel track after it had left the station, by being struck by the first-named train. It was held, that insured violated both conditions of the policy, and there was no liability for his death thereon. *Wright v. Boston & Maine R. Co.*, 129 Mass. 442. The conduct of the deceased was such as, in the words of the opinion in the case cited, is "condemned by the general knowledge and experience of all prudent men, and is conclusive on the question of due care." The danger was obvious, the exposure to it unnecessary, the want of due diligence clear; and the death of the assured occurred in consequence thereof.

NOTE 95. Bills and Notes; Negotiability. — The author's definition of negotiable instruments is quite too broad, and will hardly afford a proper test as to whether or not an instrument in the usual commercial sense is negotiable.

It seems to be well settled that, in order to be negotiable under the law

merchant, an instrument must be payable to bearer "or the order of a person named therein, for a definite sum, in money, and unconditionally. If there is any condition or qualification attached to the instrument it is not negotiable so as to pass, freed from all existing equities and defences. Thus, a note in ordinary form payable to A. or order, which in addition contains a provision that the payer shall pay all costs of collection, is held not to be negotiable. *Maryland Fertilizing, &c. Co. v. Newman*, 60 Md. 584.

In that case ALVEY, J., said: "The plaintiff sues in this case as indorsee of what is alleged to be a negotiable promissory note made by the defendant, and the question is whether the instrument sued on is, in legal contemplation, a negotiable instrument or not. The question was raised in the court below by a demurrer to the declaration; and the declaration avers that the defendant, on the 29th of September, 1880, by his promissory note payable two months after date, promised to pay David C. Avery or order \$93, payable at the Easton National Bank of Maryland; and if not paid when due, promised and agreed to pay all costs and charges for collecting the same, with interest; and that the said Avery indorsed the said note to the plaintiff, and the same was duly presented when due for payment and was dishonored, &c. The court below ruled the demurrer good, and entered judgment for the defendant, from which the plaintiff appealed.

"A promissory note may in brief be defined to be a written promise, not under seal, to pay a certain sum of money unconditionally. At common law such note was not transferable, and by the decision of the courts it was not allowed to acquire, by custom among merchants, the quality of negotiability. *Buller v. Cripps*, 6 Mod. 29; *Clerk v. Martin*, 2 Ld. Raym. 757. But by the statute 3 and 4 Anne, chapter 9, it was provided 'that all notes in writing that shall be made and signed by any person, &c., whereby such person, &c., shall promise to pay to any other person, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c., to whom the same is made payable; and also every such note payable to any person, &c., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants.' The statute further provides that actions may be maintained on such notes by the payees, or the indorsees thereof, 'in like manner as in cases of inland bills of exchange.' By the statute, therefore, such promissory notes are made commercial instruments, and when they are made payable to order or to bearer, they are indorsable and transferable as commercial paper, and are placed upon the same footing of inland bills of exchange. *Bowie v. Duvall*, 1 G. & J. (Md.) 175.

"It is true, no particular form of words is essential to constitute a valid promissory note or bill of exchange. But there are certain essential elements that every valid promissory note must contain, and the principal among these is a promise to pay a certain sum of money unconditionally

If the note be wanting in this respect, while it may be a valid specific agreement, and assignable under the provisions of the Code, it cannot be treated as a valid negotiable promissory note to be passed by indorsement. It is of great importance to the use and office of such commercial negotiable instruments as bills and notes, that they should be kept free of all conditions and singular and unusual stipulations, such as we find on the face of the note in question, whereby their negotiability might be seriously clogged or impeded. It would appear to be the requirement of the statute, as well as of the long established custom of merchants, that the note, to be negotiable, should be certain and unconditional, and not be trammelled by conditions or contingencies of any kind. In the note declared on in this case, the stipulation for the payment of all costs and charges incurred in the collection of the note, introduces an element of uncertainty quite inconsistent with the degree of certainty required as to the sum to be paid. The costs and charges of collection could never, with accuracy, be known until the collection had been made complete; and hence by coupling the certain sum mentioned in the note with that which is uncertain, and treating the note as an entire contract, it is for an unascertained sum, and therefore uncertain on its face as to the amount promised to be paid. This, as we have seen, is not allowable in notes intended to be negotiable.

“Notes of similar import to that declared on in this case have been under consideration in several of the State courts of the country; but it would appear that the decided preponderance of authority is against holding such notes to be negotiable.

“In *Woods v. North*, 84 Penn. St. 407, the note sued on contained a promise to pay to the order of the payee a certain sum of money, ‘and five per cent collection fee, if not paid when due;’ and in that case, it was held that the note was not negotiable, and that the indorser thereon was not liable. That was greatly more certain as to the sum to be paid than the promise in this case; for there the rate of percentage for collection was fixed. The same doctrine is, in express terms, affirmed in the recent case of *Johnston v. Speer*, 92 Penn. St. 227; 37 Am. Rep. 675.

“In the case of *First National Bank v. Bynum*, 84 N. C. 24; 37 Am. Rep. 604, the same principle was maintained, and the case of *Woods v. North*, 84 Penn. St. 407, applied and affirmed. And in the case of *First National Bank of Trenton v. Gay*, 63 Mo. 33; 21 Am. Rep. 423, where the note, in addition to a sum certain promised to be paid, contained a stipulation to pay ten per cent as attorney’s fee, if the note was not paid at maturity and was placed in the hands of an attorney for collection, it was held, that such note was not a negotiable instrument. See, also, *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781, and *Mahoney v. Fitzpatrick*, 133 Mass. 151; 43 Am. Rep. 502. We might refer to several other cases holding the same proposition, but we deem it unnecessary.

“In some few States different views have prevailed, and notes of simi-

lar import and character to that declared on in this case have been held to be negotiable, notwithstanding the stipulation to pay all costs and charges of collection; as in the cases of *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Wyant v. Pottorf*, 37 Ind. 512; *Sperry v. Horr*, 32 Iowa, 184, and *Seaton v. Scoville*, 18 Kan. 433; 26 Am. Rep. 779. We cannot however adopt the reasoning of those cases.

“In two or three States the stipulation in the note for the payment of costs and expenses of collection, on default of payment, has been treated as a stipulated penalty, and as such has been declared void, as in the cases of *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356, and *Witherspoon v. Musselman*, 14 Bush (Ky.), 214; 29 Am. Rep. 404. But to declare such stipulation void, in order to maintain the negotiable character of the note, is certainly a strong thing for the court to do, unless it clearly contravened some established principle of law. Parties have the right to make their contracts in what form they please, provided they consist with the law of the land; and it is the duty of the courts so to construe them, if possible, as to maintain them in their integrity and entirety. While the instrument under consideration may not be a valid negotiable promissory note, it does not by any means follow that it is not a valid contract of another description.

“In the case of *Smith v. Nightingale*, 2 Stark. N. P. Cas. 375, by the instrument declared on, the party promised to pay a sum certain, ‘and also all other sums that should be found to be due;’ and it was held, that the instrument could not be declared on as a promissory note, even for the sum certain; and Lord ELLENBOROUGH said: ‘The instrument is too indefinite to be considered as a promissory note, for it contains a promise to pay interest for a sum not specified, and not otherwise ascertained than by reference to the defendant’s books; and since the whole constitutes one entire promise, it cannot be divided into parts.’ Byles on Bills, 70. And to the same effect is the case of *Ayres v. Fearnside*, 4 M. & W. 168. Here all the terms of the instrument have been treated as an entire promise, and so declared on by the plaintiff, suing as indorsee of the note.”

Bills of Exchange, What are. — A bill of exchange is a written order directing one person to pay to another a certain sum of money, and its character must appear on its face, and cannot be changed by extrinsic proof. It is indispensable that it should be payable in money, at all events, and not out of a particular fund. *Rice v. Rayland*, 10 Humph. (Tenn.) 545; *May v. Lansdowne*, 6 J. J. Mar. (Ky.) 170; *Coyle v. Satterwaite*, 47 B. Mon. (Ky.) 124; *Nichols v. Davis*, 1 Bibb (Ky.), 490; *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47; *Cook v. Saterlee*, 6 Cow. (N. Y.) 108; *Wooley v. Sargeant*, 8 N. J. L. 262; *Tucker v. Maxwell*, 11 Mass. 143; *Smith v. Wood*, 1 N. J. L. 74; *Morrison v. Bailey*, 5 Ohio St. 13; *Bowen v. Newell*, 8 N. Y. 190; *Andrew v. Buckley*, 11 Ohio St. 89.

An order payable upon the happening of a contingency, or out of a par-

ticular fund, is not a bill of exchange. *Rayganel v. Ayliff*, 16 Ark. 594; *West v. Foreman*, 21 Ala. 408; *Bayerque v. San Francisco*, 1 McAll. (U. S. C. C.) 175; *Hawkins v. Watkins*, 5 Ark. 481; *Owen v. Lavine*, 14 id. 389; *Averill v. Booker*, 15 Gratt. (Va.) 163; *Crawford v. Cully, Wright* (Ohio), 453; *Morton v. Naylor*, 1 Hill (N. Y.), 588; *Farwell v. Kennett*, 7 Mo. 595; *Dyer v. Covington*, 19 Penn. St. 200. Although in some States it is held that the fact that a bill is payable out of a particular fund does not strip it of its character as a bill of exchange. *Kelly v. Brooklyn*, 4 Hill (N. Y.), 263.

An inland bill of exchange in this country is one drawn and payable in the same State: *Strawbridge v. Robinson*, 10 Ill. 470; *Wells v. Brigham*, 6 Cush. (Mass.) 6; *Brenzer v. Wightman*, 7 W. & S. (Penn.) 264; *Brown v. Lusk*, 4 Yerg. (Tenn.) 210; while a bill drawn in one State and payable in another is a foreign bill. *Warren v. Coombs*, 20 Me. 139; *Freeman's Bank v. Perkins*, 18 id. 292; *Bank v. Daniels*, 12 Pet. (U. S.) 32; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81; *Carter v. Burley*, 9 N. H. 558; *Green v. Jackson*, 15 Me. 136; *Piner v. Clary*, 17 B. Mon. (Ky.) 645; *Rice v. Hagan*, 8 Dana (Ky.), 133; *Brown v. Ferguson*, 4 Leigh (Va.), 87; *Harmon v. Hicks*, 1 Duv. (Ky.) 322; *Chenowith v. Chamberlain*, 6 B. Mon. (Ky.) 60; *Bank v. Steinmitz*, 1 Hill (N. Y.), 44; *Bank v. Varnum*, 49 N. Y. 269.

A person may draw a bill upon himself, in which case it is an accepted bill. *Cunningham v. Wardwell*, 12 Me. 466; *Hasey v. Sugar Co.*, 1 Doug. (Mich.) 193.

A bill may be accepted as well *after* protest as before: *Stockwell v. Bramble*, 3 Ind. 428; or after the time of payment has passed: *Williams v. Winans*, 15 N. J. L. 339; or after it has been discounted. *Bank v. Livingston*, 33 Barb. (N. Y.) 458.

An acceptance of a bill implies a consideration, and the acceptor cannot, as against an innocent holder, set up want of consideration. *Fisher v. Beckwith*, 19 Vt. 31; *Belmont v. Coleman*, 1 Bosw. (N. Y.) 188.

No particular form of expression is necessary to constitute an acceptance, and any words written upon the bill which show an intention on the part of the drawer to accept the same, constitutes an acceptance; as "accepted:" *Miller v. Butler*, 1 Cranch (U. S. C. C.), 470; or "seen" "presented," &c. *Spear v. Pratt*, 2 Hill (N. Y.), 582.

An acceptance may be made in blank, and when so made, is binding as against a *bona fide* holder, although the blank is filled by a much larger sum than was agreed upon. *Van Duzen v. Howe*, 21 N. Y. 531; *Maiese v. Knapp*, 30 Ga. 942.

Except where the statute otherwise provides, a verbal acceptance is valid. *Barnet v. Smith*, 30 N. H. 256; *Edson v. Fuller*, 22 id. 183; *Stockwell v. Bramble*, 3 Ind. 428; *Arnold v. Sprague*, 34 Vt. 402; *Leonard v. Mason*, 1 Wend. (N. Y.) 522; *Lemon v. Box*, 20 Tex. 329; *Williams v. Winans*, 14 N. J. L. 339.

In some of the States verbal acceptances are made invalid by statute.

A promise to accept a bill already drawn is good. *Howland v. Carson*, 15 Penn. St. 453; *Bank v. Gibson*, 5 Duer (N. Y.), 374; *Wildes v. Savage*, 1 Story (U. S.), 22; *Boyce v. Edwards*, 4 Pet. (U. S.) 111; *Lagrué v. Woodruff*, 29 Ga. 648; *Riggs v. Lindsay*, 7 Cranch (U. S.), 500; *McEvers v. Mason*, 10 Johns. (N. Y.) 207; *Russell v. Wiggin*, 1 Story (U. S.), 213.

Notes, What are. — A promissory note is a written promise to pay to a person named therein, or to his order, a certain sum in money or property. *Hitchcock v. Cloutier*, 7 Vt. 32; *Smith v. Bridges*, 1 Ill. 2; *Scull v. Edwards*, 13 Ark. 24; *Bristol v. Warner*, 19 Conn. 7.

No particular form of words is necessary, but any words which admit a certain sum to be due to a person, either on demand or at a future time, are sufficient. Thus "Boston, Jan. 10, 1888. Due John Doe one hundred dollars, on demand," is a promissory note. *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675; *Lacqueer v. Prosser*, 1 Hilt. (N. Y. C. P.) 246; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Huyck v. Meador*, 24 Ark. 191; *Brady v. Chandler*, 31 Mo. 28; *Finney v. Sherwin*, 7 id. 42; *Jacquín v. Walker*, 40 Ill. 459; *Carver v. Hays*, 47 Me. 257.

So an instrument in the form of a bond, but without a seal, may be a note. *Woodward v. Genet*, 2 Hilt. (N. Y. C. P.) 526; *Aurora v. West*, 22 Ind. 88.

So an instrument by which A. promises to pay to B. a certain sum at such time as B. shall require: *Goshen Turnpike v. Hartin*, 9 Johns. (N. Y.) 217; or in specific articles: *Rankin v. Sanders*, 7 Miss. 52; or in a certain kind of money, as in the bills of a particular bank: *Besancon v. Shirley*, 17 Miss. 457; or out of a particular fund: *United States v. Smith*, 2 Cranch (U. S. C. C.), 111; certificates of deposit of a certain sum payable at a future date, to the order of the person named therein: *Blood v. Northrup*, 1 Kan. 28; *Miller v. Austin*, 13 How. (U. S.) 218; *Poorman v. Mills*, 33 Cal. 118; *Drake v. Markle*, 21 Ind. 432; *Hunt v. Divine*, 37 Ill. 137; *Austin v. Miller*, 5 McLean (U. S.), 153; or to pay a sum of money upon a certain contingency, as when William H. Harrison is elected president. *Williams v. Smith*, 4 Ill. 524.

An ordinary due bill, as "Due John Doe twenty dollars," is treated as a note. *Lacqueer v. Prosser*, 1 Hill (N. Y.), 246; *Jacquín v. Walker*, 40 Ill. 459; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Russell v. Whipple*, 2 Cow. (N. Y.) 536; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675; *Brady v. Chandler*, 31 Mo. 28; *Carver v. Hays*, 47 Me. 257; *Huyck v. Meador*, 24 Ark. 191; *McGowen v. West*, 7 Mo. 569; *Cummings v. Freeman*, 2 Humph. (Tenn.) 183. In *Franklin v. March*, 6 N. H. 364, a writing as follows: "Good to Robert Cochran or order for thirty dollars, borrowed money," was held to be a note.

Any instrument in writing in which the party signing it expressly or impliedly promises to pay another a certain sum absolutely, and which

does not purport to be a contract of another character, may be treated as a promissory note. *Rankin v. Sanders*, 7 Miss. 52; *Aurora v. West*, 22 Ind. 88; *Woodfolk v. Leslie*, 2 N. & McCord (S. C.), 585; *Hostetter v. Wilson*, 36 Barb. (N. Y.) 307; *Erichs v. De Mill*, 75 N. Y. 370. But in order to constitute an instrument a negotiable promissory note under the law merchant, it must be payable absolutely and in money. *Bank v. Armstrong*, 25 Minn. 530.

Indorsers. — The payee of a note or bill made payable to him or order may make it payable to bearer by merely indorsing it in blank, so that the holder of it may maintain an action for the recovery of the amount thereof. *Lyon v. Ewings*, 17 Wis. 61; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Perry v. Crammond*, 1 Wash. (U. S.) 100; *Martin v. Warren*, 11 Ark. 285; *Temple v. Hays*, 1 Morr. (Iowa) 9; *Hays v. Cage*, 2 Tex. 501; *Little v. O'Brien*, 9 Mass. 423; *French v. Barney*, 1 Ired. L. (N. C.) 219. And any holder thereof may fill up the blank with any name he chooses; in which event it can only pass by the indorsement of such person. *Ritchie v. Moore*, 5 Munf. (Va.) 388; *Kennon v. McRae*, 7 Port. (Ala.) 175; *Adams v. Smith*, 35 Me. 324; *Bank v. Garey*, 6 B. Mon. (Ky.) 626; *Warner v. Lee*, 6 N. Y. 144; *Bank v. Smith*, 18 Johns. (N. Y.) 230; *Cole v. Cushing*, 8 Pick. (Mass.) 48; *Adams v. Smith*, 35 Me. 324; *Ayre v. Medlock*, 25 Ala. 281; *Farwell v. Meyer*, 36 Ill. 510. And he may erase the indorsement any time before he delivers the note to the person to whom he made it payable. *Smith v. Morrill*, 54 Me. 48; *Tenney v. Prince*, 4 Pick. (Mass.) 385.

Consideration. — A negotiable bill or note imports a consideration, and neither the payee nor holder is required to prove any. *Powell v. Graves*, 14 La. An. 860; *Muggah v. Tucker*, 10 id. 683; *Clunas v. Gallagher*, 6 id. 857; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Coburn v. Odell*, 30 N. H. 540; *Bank v. Chambers*, 11 Rich. L. (S. C.) 657; *Murry v. Clayborn*, 2 Bibb (Ky.), 300; *Middlebury v. Case*, 6 Vt. 165; *Gains v. Kendrick*, 2 Treadw. (S. C.) 340; *Horn v. Fuller*, 6 N. H. 511; *Camp v. Tompkins*, 9 Conn. 545; *Daniels v. Andrews*, Dudley (Ga.), 557; *Schoonmaker v. Roosa*, 17 Johns. (N. Y.) 301; *Jerome v. Whitney*, 7 id. 321; *Feagan v. Cureton*, 19 Ga. 404; *Kennedy v. Murdick*, 5 Hall (Del.), 263; *Stacker v. Hewitt*, 2 Ill. 207. And the consideration can only be attacked in a suit by the payee, or a holder who took it when it was overdue, or who is chargeable with notice of the defect. *Harlow v. Boswell*, 15 Ill. 56; *Baker v. Arnold*, 3 Caines (N. Y.), 279; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Brown v. Daggett*, 22 Me. 30.

As between the payee and the maker, any valuable consideration is sufficient, — as information given *bona fide* to a party litigant: *Chandler v. Mason*, 2 Vt. 193; for a dower interest: *Ladd v. Beatty*, Wright (Ohio), 460; an agreement to convey land: *Crawford v. Robie*, 42 N. H. 162; *Carman v. Pultz*, 21 N. Y. 547; *Kerney v. Gardner*, 27 Ill. 162; a pre-existing debt: *Wren v. Hoffman*, 4 Minn. 616; *Bank v. Krun*, 15 Iowa,

53; *Varnum v. Bellamy*, 4 McLean (U. S.), 87; in compromise of a doubtful or disputed claim: *Russell v. Cook*, 3 Hill (N. Y.), 404; *Stewart v. Ahrenfeldt*, 5 Den. (N. Y.) 189; *Richardson v. Comstock*, 21 Ark. 69; *Winston v. McFarland*, 22 Ill. 38; forbearance to sue a legal claim: *Depeau v. Waddington*, 6 Whart. (Penn.) 220; *Jackson v. Finney*, 33 Ga. 512; *Jamison v. Stafford*, 1 Cush. (Mass.) 168; *Harter v. Johnson*, 16 Ind. 271; *Smith v. Taylor*, 39 Me. 242; *Grant v. Chambers*, 30 N. J. L. 323; *Bank v. Wixon*, 46 Barb. (N. Y.) 218; in settlement of a tort: *Whitenack v. Ten Eyck*, 3 N. J. Eq. 249; for improvements on public lands: *Freeman v. Holliday*, 1 Morr. (Iowa) 80; the release of an attachment: *Hackett v. Pickering*, 5 N. H. 19; the debt of a third person: *Brainard v. Capelle*, 31 Mo. 428; an interest in a patent, whether valuable or not: *Myers v. Turner*, 17 Ill. 179; or indeed any valuable thing given, done, or agreed to be done as a consideration of the note: *Hapgood v. Palley*, 35 Vt. 649; *Taggart v. Rice*, 37 Vt. 47; *Estep v. Burke*, 19 Ind. 87; *Hodges v. Schuler*, 22 N. Y. 114; *Walbridge v. Arnold*, 24 Conn. 500.

But as between the payee and the maker, or the latter and a holder with notice, want of or failure of consideration is a defence. Thus it may be shown that the note was given in payment of a wholly unfounded claim, but before suit was brought upon it: *Sullivan v. Collins*, 18 Iowa, 228; or to obtain goods wrongfully withheld by the payee: *White v. Heylman*, 34 Penn. St. 142; or for love and affection: *Smith v. Kittredge*, 21 Vt. 288. Or it may be shown that there has been a *total* failure of consideration. *Parrott v. Farnsworth*, Brayt. (Vt.) 174; *Scudder v. Andrews*, 2 McLean (U. S.), 464; *Sawyer v. Chambers*, 44 Barb. (N. Y.) 42. But a partial failure of consideration, in the absence of any statute making it so, is not a defence. *Pulcifer v. Hotchkiss*, 12 Conn. 254. Thus, in the case last cited, where A. had sold an interest in a patent right to B., accompanied with a false representation, and the interest, though of some value, was of less value than it would have been if the representation had been true, but the difference was of an uncertain and unliquidated amount, and B. did not repudiate the contract nor offer to restore the interest sold, it was held, in an action on a note given by B. to A. for such interest, that B. could not avail himself of such partial failure of consideration to reduce the damages below the sum expressed in the note. The rule is that a partial failure of consideration is no defence to a note unless coupled with fraud. *Boone v. Queene*, 2 Cranch (U. S. C. C.), 371; *Varnum v. Manro*, 2 id. 425; *Elninger v. Drew*, 4 McLean (U. S.), 388; *Reese v. Gordon*, 19 Cal. 147; *Carpenter v. Phillips*, 2 Houst. (Del.) 524; *Jordan v. Jordan*, Dudley (Ga.), 181; *Hinton v. Scott*, id. 245; *Scudder v. Andrews*, 2 McLean, 464; *Washburn v. Picott*, 3 Dev. L. (N. C.) 390; *Williams v. Briscoe*, 1 A. K. Marsh. (Ky.) 168; *Ball v. Jackson*, id. 176; *Urse v. Kelley*, 2 A. K. Marsh. (Ky.) 545; *Wentworth v. Goodwin*, 21 Me. 150; *Clark v. Peabody*, 22 Me. 500; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490; *Fletcher v. Chase*, 16 N. H. 38; John-

son *v.* Titus, 2 Hill (N. Y.), 606; Gillespie *v.* Torrance, 4 Bosw. (N. Y.) 36; Burton *v.* Schermerhorn, 21 Vt. 289; Richardson *v.* Sanburn, 33 Vt. 75; Cragin *v.* Fowler, 34 Vt. 326. If, however, the failure is total, as if the note was given to satisfy a judgment which was afterwards set aside: Dennison *v.* Brown, 3 Vt. 170; or of services to be rendered by the payee which he does not render: Wood *v.* Kendall, 7 J. J. Marsh. (Ky.) 212, the surety is discharged.

Illegality in the consideration — as, if the note was given for the price of goods, the sale of which is prohibited by law — is a good defence as between the original parties to the note: Hone *v.* Ammons, 14 Ill. 29; Carlton *v.* Bailey, 27 N. H. 280; Coburn *v.* Odell, 30 N. H. 540; as for liquors: Webster *v.* Sanborn, 47 Me. 471; Hubbell *v.* Flint, 13 Gray (Mass.), 277; Gorsuth *v.* Butterfield, 2 Wis. 237; or of lottery tickets, the sale of which is prohibited by statute: Hawkins *v.* Cox, 2 Cranch (U. S. C. C.), 170; Lemon *v.* Grosskopf, 22 Wis. 447; or for compounding a felony: Bowen *v.* Buck, 28 Vt. 308; Hinesburgh *v.* Sumner, 9 Vt. 23; Smith *v.* Richards, 29 Conn. 282; Porter *v.* Havens, 37 Barb. (N. Y.) 343; Murphy *v.* Botomer, 40 Mo. 67; Clark *v.* Pomeroy, 4 Allen (Mass.), 434; Swan *v.* Chandler, 8 B. Mon. (Ky.) 97; Brown *v.* Padgett, 36 Ga. 609. But a note given in settlement of the pecuniary damage resulting from a crime, without any understanding or agreement that a criminal prosecution therefor shall not be had, is valid. Clark *v.* Pomeroy, 12 Allen (Mass.), 557. So a note given in satisfaction of a mere misdemeanor, as an assault, is valid: Mathison *v.* Hawks, 2 Hill (S. C.), 625; or not to prosecute for bastardy: Sharp *v.* Teese, 9 N. J. L. 352; Hays *v.* McFarlin, 32 Ga. 699; Maxwell *v.* Campbell, 8 Ohio St. 265; Rice *v.* Maxwell, 21 Miss. 289; Howe *v.* Litchfield, 3 Allen (Mass.), 443; Knight *v.* Priest, 2 Vt. 507; Weaver *v.* Waterman, 18 La. An. 241; Payne *v.* Eden, 3 Caines (N. Y.), 212; Stephens *v.* Spiers, 25 Mo. 386.

A note given for a gambling debt or wager, is void for illegality. Cutter *v.* Welch, 43 N. H. 497; Danforth *v.* Evans, 16 Vt. 538; Crawford *v.* Storms, 41 Miss. 540; Denny *v.* Elkins, 4 Cranch (U. S. C. C.), 161; Mordecai *v.* Dawkins, 9 Rich (S. C.), 262.

But such notes are valid in the hands of an innocent holder for value. Haight *v.* Joyce, 2 Cal. 64; Pindar *v.* Barlow, 31 Vt. 529.

Duress, Fraud, &c. — Where a note is obtained by duress, either by threats of bodily harm, or of arrest for a crime, or by the abuse of legal process, it is voidable at the election of the maker. Osborn *v.* Robbins, 36 N. Y. 365; Gillett *v.* Ball, 9 Penn. St. 13; Shaw *v.* Spooner, 9 N. H. 197; Alexander *v.* Pierce, 10 N. H. 494; Meadows *v.* Smith, 7 Ired. Eq. (N. C.) 7; Brown *v.* Taylor, 16 Vt. 22; Lumber Co. *v.* Patterson, 33 Cal. 334; but is valid in the hands of a *bona fide* holder for value, and without notice of the vice. Clark *v.* Pease, 41 N. H. 209; Veach *v.* Thompson, 15 Iowa, 380.

Fraud in procuring a note or in the consideration, is a defence to an

action on the note by the payee, or any one actually or legally affected with notice of the fraud. *Price v. Lewis*, 17 Penn. St. 51; *Barber v. Kerr*, 3 Barb. (N. Y.) 149; *Brice v. Davenport*, 36 id. 349; *Simmons v. Cutreer*, 20 Miss. 584; *Fisk v. Collins*, 9 Mo. 137.

But the fraud must relate to something material: *Hodges v. Torrey*, 28 Mo. 99, and work an injury to the maker. *Austell v. Rice*, 5 Ga. 472.

Thus in an action on a promissory note, the defence was fraud in obtaining it. The defendant offered evidence that the note was given by him as security for a debt due from him to the plaintiff, for which the plaintiff held his accepted drafts, which drafts the plaintiff was to give up, upon receiving the note, but which he retained for some months afterwards, and then having received payment thereon from the acceptor, and giving him a receipt in full, gave them up with the acceptances erased. It was held, that proof of these facts was relevant to establish the defence. *Shepard v. Hawley*, 1 Conn. 367.

In *James v. Mercer University*, 17 Ga. 515, a promissory note for a certain sum was given as a donation to a proposed manual labor school. It was held, that if the note was procured by representations that it was to be a manual labor institution, and the donor subscribed upon that representation, and the manual labor department was then abolished, it constituted a fraud on his rights, and no recovery could be had on the note.

In *Warren v. Lynch*, 5 Johns. (N. Y.) 239, where A., the debtor of B., gave a note to C. for the amount of the debt, in order to prevent its being attached by a creditor of B., and before any attachment had issued, and indorsed the note to D., who had advanced money for A., — it was held that D., not being privy to any fraud in A., could not be affected by it, and could recover on the note as a *bona fide* indorsee with consideration.

So where A. made a note payable to B. or order, which was indorsed by B., for the purpose of being discounted at a bank, and for the accommodation of A., who, on its being refused at the bank, negotiated it to a third person, with a knowledge of the circumstances, this was held not to amount to a fraud which could affect the rights of the holder against the maker or indorser. *Powell v. Waters*, 17 Johns. (N. Y.) 176.

But where the bookkeeper and cashier of a mercantile firm, by making false additions, and omitting to charge himself with large sums of money appropriated by him, had fraudulently made a balance appear due to him, upon the books of the firm, when in fact he was indebted to the firm, and had taken a note for the balance thus appearing, it was held, in an action brought by him upon the note, that the defendants might show his fraud in defence. *Barber v. Kerr*, 3 Barb. (N. Y.) 149.

In *Smith v. Andrews*, 8 Ired. L. (N. C.) 3, it was held that an indorsee of a note tainted with fraud, who is fairly put upon inquiry, cannot recover for deceit in the sale of the note. In that case a note was taken for a horse in a trade between A. and B., and A. took the note after B.'s conversation had thrown suspicion upon it, and also after his refusal to

indorse it. It was held, in an action by A. for deceit, against B., that, as A. had taken the note at his own risk, the rule of *caveat emptor* must apply; and, unless B. appeared to have used some artifice or practice to conceal the defects in the note, that he was not liable for deceit.

In *Stacy v. Ross*, 27 Tex. 3, where S. drew up a note and read it to R. as bearing five per cent interest, when it in fact was at eight per cent, and R., who was unable to read, was thereby induced to sign it, it was held that the note was void *in toto* for want of assent.

An indorsement may be made "without recourse" or at the indorsee's "own risk," in which case the indorser assumes no liability. *Craft v. Fleming*, 46 Penn. St. 140; *Bank v. Greenwood*, 2 Allen (Mass.), 434. But it passes the title to the note with all its negotiable qualities. *Epler v. Funk*, 8 Penn. St. 468.

The holder of a note with a conditional or restrictive indorsement cannot erase or change it. *Nevins v. Degrand*, 15 Mass. 436.

Strictly, only the payee of a note, and those into whose hands it passes by indorsement, who indorse it, are indorsers. A person who is not a party to the note: *Smith v. Kessler*, 44 Penn. St. 442; *Crozer v. Chambers*, 20 N. J. L. 256; *Badger v. Barnabee*, 17 N. H. 120; or who indorses it before or at the time of its delivery to the payee, is treated as an original promisor or maker, and is not entitled to notice of presentment or protest. *Colburn v. Averill*, 30 Me. 310; *Childs v. Wyman*, 44 Me. 433; *Adams v. Hardy*, 32 Me. 339; *Nash v. Skinner*, 12 Vt. 219; *Sylvester v. Downer*, 20 Vt. 355; *Carr v. Rowland*, 14 Tex. 275; *Martin v. Boyd*, 11 N. H. 385; *Peckham v. Gilman*, 7 Minn. 446; *Sullivan v. Violet*, 6 Gill (Md.), 181; *Bryant v. Eastman*, 7 Cush. (Mass.) 111; *Carpenter v. Oaks*, 11 Rich (S. C.), 17; *Perkins v. Barstow*, 6 R. I. 505; *Cecil v. Mix*, 6 Ind. 478; *Wetherwax v. Paine*, 2 Mich. 555; *Lewis v. Harvey*, 18 Mo. 74. But in some States he is held as a guarantor where he indorses his name upon the note without any conditional or restrictive words: *Benton v. Willard*, 17 N. H. 598; *Firman v. Blood*, 2 Kan. 496; *Riggs v. Waldo*, 2 Cal. 485; *Van Doren v. Tjador*, 1 Nev. 380; *Blatchford v. Milliken*, 25 Ill. 434; or as a surety: *Richards v. Butman*, 14 La. An. 144; *Smith v. Morrill*, 54 Me. 48; see also *Norton v. Hall*, 41 Vt. 471; while in others he is treated as an indorser: *Price v. Lavendar*, 38 Ala. 389; *Beidman v. Gray*, 35 Mo. 382; *Davis v. Barron*, 13 Wis. 227; *Moore v. Cross*, 19 N. Y. 227; *Spies v. Gilmore*, 1 id. 321; *Bigelow v. Colton*, 13 Gray (Mass.), 309; *Collins v. Everett*, 4 Ga. 266; *McGaughey v. Elliott*, 18 Ind. 121; and in others parol evidence is admissible to show in what capacity he indorsed. *Cody v. Shepherd*, 12 Wis. 639; *Lill v. Leslie*, 16 Ind. 236; *Taylor v. McCune*, 11 Penn. St. 460; *Sturtevant v. Randall*, 53 Me. 149; *Lester v. Paine*, 39 Barb. (N. Y.) 616; *Guldin v. Lenderman*, 34 Penn. St. 58.

NOTE 96. Partnership. — A partnership may exist either by contract or by operation of law. A partnership exists by contract when two or

more persons have agreed to enter into a common venture, and share the profits or losses thereof. *Arquimbo v. Hillier*, 49 N. Y. Superior Ct. 253; *Priest v. Choteau*, 12 Mo. App. 252; *Welsh v. Canfield*, 60 Md. 469; *Jones v. Call*, 93 N. C. 170; *Bohner v. Drake*, 33 Minn. 408; *Plummer v. Trost*, 81 Mo. 425; *Lynch v. Thompson*, 61 Miss. 354.

But a mere agreement to share in the profits does not constitute a partnership. *Parcher v. Anderson*, 5 Mont. 438; *Gill v. Ferris*, 82 Mo. 156; *Ashby v. Shaw*, id. 76; *Culley v. Edwards*, 44 Ark. 423; *Taylor v. Bush*, 75 Ala. 452; *Sadeker v. Applegate*, 24 W. Va. 1; *Cassidy v. Hall*, 97 N. Y. 159; *Wass v. Atwater*, 33 Minn. 83; *Wells v. Babcock*, 56 Mich. 276; *Thayer v. Augustine*, 55 Mich. 187; *Mouroe v. Greenhoe*, 54 Mich. 9; *Gurr v. Martin*, 73 Ga. 528; *Schaeffer v. Fowler*, 111 Penn. St. 451; *Wright v. Del. & Hud. Canal Co.*, 40 Hun (N. Y.), 343; *Einstein v. Gourdin*, 4 Woods (U. S. C. C.), 415; *Swann v. Sanborn*, 4 id. 625; *Pond v. Cummins*, 50 Conn. 372.

A person who lends money to one partner, to be paid out of the profits of the business, or in consideration of receiving a certain share of the profits, is not a partner, either as to third persons or the firm. *Cox v. Hickman*, 8 H. L. 268, has overturned the senseless doctrine formerly held in this regard; and the rule stated by O'BRIEN, J., that a partnership is not constituted by the mere fact of two or more persons participating or being interested in the net profits of the business, but that the existence of a partnership implies also the existence of such a relation between the persons as that each of them is a principal and each an agent for the others, has been generally adopted in this country. *Richardson v. Hughitt*, 76 N. Y. 55; *Polk v. Buchanan*, 5 Sneed (Tenn.), 721; *Hart v. Kelley*, 83 Penn. St. 286; *In Re Francis*, 2 Sawyer (U. S. C. C.), 286; *Williams v. Sautter*, 7 Iowa, 435; *Harvey v. Childs*, 28 Ohio St. 219; *Boston, &c. Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3.

A person who so conducts himself as to induce people to believe that he is a partner, is held liable as such to third persons, although he is not so in fact. *Hancock v. Hintrager*, 60 Iowa, 374; *Woolward v. Clark*, 30 Kan. 78; *Martin v. Farwell*, 79 Mo. 401; *Snyder v. Burnham*, 77 Mo. 52.

NOTE 97. Sale of Lands. — In the rudest state of society in all countries, some formality beyond mere words signifying the consent of parties to the transfer of lands, has always been necessary, for the purpose of giving notoriety to a transaction which was to determine the reciprocal rights and obligations of the parties to this important description of property.

With regard to personal property, or "movables," the things being the subject of manual delivery, a mere parol expression of consent has at all times been held sufficient to consummate and publish the transfer.

As to feudal tenures and the jealousy with which they were guarded. see *Bract. Lib. 2, cap. 584*; *Lib. Feud. 5, tit. 13*; 4, tit. 45, edit. Cujac. These

tenures received a severe blow in the reign of Edward I. by the passage of the statute *Quia Emptores*, which combined the power of alienation in the vassal with the preservation of the fruits of the tenure to the land, and were finally destroyed by stat. Charles II., by which the restraint upon the testamentary disposition of lands was removed.

In the first ages of man, in his social state, the history of most nations informs us that some peculiar ceremony was required to transfer the title to land. Sometimes these ceremonies were arbitrary and sometimes judicial and transacted before magistrates. Heineccius Rom. Antiq. Lib. 2, tit. 1, nos. 19, 20; also see Genesis, chap. 23.

In feudal times the transfer of the possession of lands implied an investiture, as well as a grant, as the possession of land carried with it a reciprocity of personal duties, and being incorporeal rights and incapable of actual delivery, the notoriety of delivery was supplied by the solemnity of an instrument sealed and delivered. Such things were held not to lie in grant, as reversions, remainders, rents, advowsons, commons, and similar hereditaments; but manors, houses, and lands, being of a corporeal nature and susceptible of a specific transfer, were transferred by livery of seisin.

While society was in its rudimental state, and writing uncommon, the notoriety of the livery was relied upon, until the formality of a written instrument supplied the necessary authentication of both livery and seisin, and produced a relaxation of the old ceremonies. The first feudal grants are said to have been gratuitous, whereby the donor parted only with the *dominium utile* or usufruct to the vassal, reserving to himself the *dominium directum*; and, on account of the favor which prompted the gift, there seems to have been much humility in the form of acceptance by the donee, who, being chosen for his personal qualifications or deserts, received from the hands of the superior himself his investiture in the presence of the *pares curiae*, and on the land itself, with a vigorous exaction and observance of those circumstances of ceremony which were calculated to impress the memory of the transaction on the witnesses. The first departure, in practice, from the rigor of the primitive observances, seems to have been a symbolical delivery of the possession; though from the great inconvenience in many cases of making the corporeal transfer, this substitution must be but little short of the antiquity of the direct method by livery and seisin on the land itself; and indeed, it seems to have been the usage of very remote times. Thus, the delivery of a shoe was the symbol of the transfer of the land of Elimelech to Boaz. The purchase by Jeremiah of Hanameel's field was ratified by an instrument, subscribed, sealed, and witnessed in open court. Jeremiah xxxii. 10-12. But this seemed to be only a memorial of the transaction, and a method of recording the testimony of the ocular witnesses.

As it was the intention of the words, which were used before writing was adopted, to declare the tenor of the grant, and the nature and obligation of the investiture, so when the practice added writing to the trans-

action, such writing only recorded the fact and intention of the parties, in a form extremely short and simple. See the account of the *breve testatum* in the Book of Feuds, I. tit. 4, and Craig, Lib. 2, dig. 2, no. 16.

This simple method very soon assumed a more complicated form, and express stipulations, conditions, and restrictions adapted to the more intricate wants and interests of society were incorporated into grants, and speedily became the leading feature thereof.

This was the natural result of the altered condition of things to subtract from the feudal investiture much of its sanctity and publicity. The *improper investiture*, as it was called, being received from the attorneys or stewards of the lord, instead of the lord himself, came into common practice, and the attestation was made by witnesses, who were not the *pares curiae* of the particular manor.

The ancient form of conveyance gradually changed from the dignity of the *proper investiture*, and the ingenuity of conveyancers was constantly employed to do away with livery of seisin. In Dalrymple on Feudal Property, ch. 6, § 3, it is said that "earlier than the time of Littleton it had come into fashion to transmit land by attornment if there was a tenant, and by a lease and release if there was none; in the first of which cases, the form of getting the consent of the tenant of the ground to the transfer supplied the place of that livery, which could not be given; and in the other case, the grantor gave the grantee an imaginary lease, in order to put him into possession, and the next minute released."

The ceremony of attornment, however, seems at all times to have produced more danger than security to property. The statute 4 Ann. c. 16, § 9, has therefore made all grants and conveyances good, without attornment, and thus removed the necessity of making it; but its efficacy as an act of notoriety and evidence yet remained, and as it appears continued to be made an ill use of; for the statute 11 Geo. 2, c. 19, § 11, reciting that the possession of estates was rendered very precarious by the frequent and fraudulent practice of tenants in attorning to strangers, who claim title to the estate of their respective landlords or lessors, who are thereby put out of the possession of their respective estates, and put to the difficulty and expense of recovering the same by action at law; it is therefore, thereby enacted, that all such attornments shall be void, and the possession not altered. But it is also thereby provided that the same act shall not extend to affect any attornment made pursuant to any judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or made to any mortgagees after the mortgage has become forfeited.

In each of these methods by attornment, and lease and release, an ostensible act was done to change the property, as the attorning in one case and the actual entry under the lease in the other was a *ceremony*, although slight, in comparison with the ancient formalities which took place under the feudal feoffment. During this period the practice of creating secret

trusts for the purpose of evading feudal burdens, threatened to become universal. "Which practice," says Lord BACON, Use of the Law, 158, "was turned to deceive many of their just and reasonable rights, and a person suing for land did not know against whom to bring his action, or who was the owner of the land. The wife was defrauded of her dower; the husband of his curtesy; the lord of his wardship, relief, heriot and escheat; the creditor of his extent for debt, and the poor tenant of his lease."

To remedy the inconvenience of these creations of uses and trusts in respect to lands, a number of statutes were enacted to make the *cestui que use*, for the particular purpose then in the contemplation of the legislature, the true owner of the land. Thus the stats. 50 Edw. 3, c. 16; 2 Ric. 2, Sess. 2, c. 3; 19 Hen. 7, c. 15, subjected the land to be extended by the creditors of the *cestui que use*; 1 Ric. 2, c. 9; 4 Hen. 4, c. 7; 1 Hen. 6, c. 3; 1 Hen. 7, c. 1, allowed actions for the freehold to be brought against the *cestui que use*, if in the actual pernancy of the profits; 11 Hen. 6, c. 5, made the *cestui que use* liable to the action of waste; 1 Ric. 3, c. 1, gave legal effect to his conveyances and leases made without the concurrence of his feoffees; and 4 Hen. 7, c. 17; 19 Hen. 7, c. 15, made him answerable for the feudal perquisites, and gave the lord the wardship of his heir. The statute 27 Hen. 8, c. 10, called the Statute of Uses, at once identified the use with the legal property in the land, or, in other words, *transferred the use into the possession*, or, as is sometimes said, annexed the possession to the use. Before this statute, *equitable* estates were created without *livery*, or *entry*, or *attornment*, and by virtue of this statute, these equitable estates, as soon as they were created, became clothed with the legal interest, so that *legal* estates became grantable without *livery*, *entry*, or *attornment*. The bargain and sale came now, therefore, to be the general method of conveyance, which, having once raised the use upon the valuable consideration, left the statute to do the rest of the work; and so completely does form and solemnity seem at this juncture to have been lost sight of, that it appears, according to some authorities, and that of Lord COKE among others, that even lands might, in the interval between the Statute of Uses and Enrolments, have been transferred by a parol bargain and sale. See 2 Inst. 675; 1 Leon. 18. Nor does it appear that such unsolemn modes of conveyance, where the customs of boroughs have sanctioned them, received a decided and universal prohibition till the great statute of Charles the Second was enacted. In the mean time, it should be remarked, that the evil which it was the direct purpose of the statute to prevent, eluded its intention in the new shape of a trust, the courts having determined a use upon a use, not to be executed or converted into the legal estate by the statute. The easy and informal transfer of real property, by the secret method of a bargain and sale unrecorded, called for legislative interference by the Statute of Enrolments, whereby it was made (27 Hen. 8, c. 16) necessary to register in court these conveyances of the freehold, which were thenceforth required to be in

writing, under seal. But this statute omitted to extend its provisions to bargains and sales for terms of years, the consequence of which omission was the total disappointment of its salutary purpose by the conveyance by lease and release, not then, indeed, for the first time invented, but for the first time founded on a lease made by a bargain and sale, to save the necessity of the entry, by the help of the use executed by the statute.

Amid all these changes, however, under which the old feudal fabric of conveyance had sunk into desuetude, the transfer by parol, if the act of livery accompanied, existed potentially, until the Statute of Frauds and Perjuries imposed universally the necessity of writing upon all conveyances of lands, or interests in lands, for more than three years. As the registering was avoided by the lease and release, so the necessity of writing might have been eluded by parol declarations of trusts, but the Statute of Frauds and Perjuries had this danger also in view, and by the seventh and eighth sections made all actions, declarations, and assignments of trusts, void; and, upon the whole, the statute would have restored the notoriety without the inconvenience of the feoffment by livery of seisin, had it seemed, in other respects, proper to the framers thereof to have extended the provision to the registration and recording of what it has required to be in writing. By an act of the 2d Ann. c. 4, a register is directed to be kept of all deeds and conveyances affecting lands in the West Riding of Yorkshire. Another statute of the same Queen, 6 Ann. c. 35, has established a similar register in the East Riding. A third, viz. 7 Ann. c. 20, does the same for the county of Middlesex. And, by the statute 8 Geo. 2, c. 6, the benefit of a similar provision is extended to the North Riding of Yorkshire. Registration has been made universal in Scotland, with great advantage to that country. See Dalrymple on Feuds, chap. 6, § 4. And in this country it is required in all the States. Wood's Statute of Frauds, p. 346.

The passing of the statute, 29 Car. 2, c. 3, is, however, properly regarded as a new and important era in the law in respect to contracts, trusts, and translations, of or concerning property in land: and past experience having proved the fertility of invention in suggesting means of eluding similar restraints, the courts seem resolved to make the wisdom of this law effectual, by discountenancing subtle distinctions and evasive exceptions. Epithets of a harsh kind have sometimes been thrown upon it; and to some it has seemed to be a miscellany of unconnected provisions: its objects were certainly numerous and extended, and subsequent experience and modern refinement may find something in the matter to be supplied or altered, and something in the language to be corrected, but a general and simultaneous view of its enactments will disclose to the diligent and unpresumptuous student a totality of plan and structure, and a wise and uniform purpose of protecting and purifying the daily commerce of mankind.

The temptation to convey so important a property as land without writing is small, and even when writing was rare, the livery of seisin was generally accompanied with the charter of feoffment. But, as the use of this accompanying instrument, although general, was not essential, and as livery became a transaction of less importance and solemnity, the possibility of swearing a man out of his property in land seemed to be such as might prove a temptation to the needy and profligate, and to remedy this great evil the statute of 29 Car. 2, c. 3, known as the Statute of Frauds, was adopted in 1678, and from that period the title to lands has become more definite and fixed, as no title or interest in or concerning lands could thereafter be conveyed, except by deed or note in writing signed by the party assigning, granting, or surrendering the same.

Under the Statute of Frauds, in all the States, a contract which involves the title to lands, or anything *permanently* connected therewith, comes within its provisions. *Bliss v. Thomson*, 4 Mass. 488; *Scotten v. Brown*, 4 Harr. (Del.) 324; *Blood v. Hardy*, 15 Me. 61; *Patterson v. Cunningham*, 12 id. 506; *Hughes v. Moore*, 7 Cranch (U. S. C. C.), 176; *Folsom v. Great Falls Co.*, 9 N. H. 355; *Vichi v. Osgood*, 8 Barb. (N. Y.) 130; *Slocum v. Seymour*, 36 N. J. L. 138; *Kingsley v. Holbrook*, 45 N. H. 319; *Olmstead v. Niles*, 7 id. 522; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Warren v. Leland*, 2 Barb. (N. Y.) 614; *Bishop v. Bishop*, 11 N. Y. 123; *Home v. Batchelder*, 49 N. H. 204; *Summers v. Cook*, 28 Grant (Ont.), 179; *Vancheck v. Rae*, 50 Barb. (N. Y.) 302; *Beacon v. Parker*, 137 Mass. 309; *Lillie v. Dunbar*, 62 Wis. 198; *Spencer v. Lawton*, 14 R. I. 494; *Dunphy v. Ryan*, 116 U. S. 491; *Clifford v. Heald*, 141 Mass. 322; *Sharp v. Blankenship*, 67 Cal. 441; *Kelly v. Kelly*, 54 Mich. 30; *Proute v. Schutte*, 18 Ill. App. 62; *Wallace v. Long*, 105 Ind. 522; *Kerr v. Hill*, 27 W. Va. 576; *Minn v. Chandler*, 21 S. C. 480; *Allen v. Richards*, 83 Mo. 55.

But contracts which, although they relate to matters which are connected with land, yet are only temporarily a part thereof, do not come within the statute. *Douglass v. Shumway*, 13 Gray (Mass.), 498; *Nettleton v. Sykes*, 8 Met. (Mass.) 34; *Parsons v. Smith*, 5 Allen (Mass.), 578; *Delaney v. Root*, 99 Mass. 546; *Purner v. Piercy*, 40 Md. 212; *Cain v. McGuire*, 13 B. Mon. (Ky.) 840; *Thouverin v. Lea*, 26 Tex. 612; *Keyson v. School District*, 35 N. H. 477; *Green v. Vandiman*, 2 Blackf. (Ind.) 324; *Cassell v. Collins*, 23 Ala. 676; *Barnes v. Pevine*, 15 Barb. (N. Y.), 247; *Scoggin v. Slater*, 22 Ala. 687; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Benedict v. Beebe*, 11 Johns. (N. Y.) 145; *Beach v. Allen*, 10 Hun (N. Y.), 441; *Marshall v. Ferguson*, 23 Cal. 65; *Owens v. Lewis*, 46 Ind. 488; *Daniels v. Bailey*, 43 Wis. 560; *Fitch v. Burk*, 38 Vt. 687; *Sterling v. Baldwin*, 42 id. 306; *Kilmore v. Howlett*, 48 N. Y. 509; *Ball v. Grissey*, 19 Ill. 631; *Heavilon v. Heavilon*, 29 Ind. 509; *Bryant v. Crosby*, 40 Me. 9; *Cutter v. Pope*, 13 Me. 377; *McCarty v. Oliver*, 14 U. C. C. P. 290; *Kerr v. Cornell*, Berton (N. B.), 151; *Giles v. Simonds*,

15 Gray (Mass.), 444 ; Rogers v. Cox, 96 Ind. 157 ; Long v. White, 42 Ohio St. 59. Nor does a contract with a person to purchase land for another : Allen v. Richards, 83 Mo. 55, or to buy and sell lands and share the profits fall within the statute : Pennybaker v. Leary, 65 Iowa, 220 ; Carr v. Leavitt, 54 Mich. 30 ; Walton v. Karnes, 67 Cal. 25.

In order to comply with the provisions of the statute, the memorandum must contain all the essential elements of the contract. No particular form is necessary, but everything essential to make an enforceable contract must be contained therein, as the names of the parties, the estate to be conveyed, and the price to be paid. The memorandum cannot be used to *make*, but to prove a contract already made. It need not all be embraced in one instrument, but letters, telegrams, and other documents may amount to such an agreement as is binding on the parties, so that the court can give effect to it as a contract, and parol evidence is not admissible to add to or detract from it. Bacon v. Daniels, 37 Ohio St. 279 ; Williams v. Robinson, 73 Me. 186 ; Mason v. Decker, 72 N. Y. 595 ; Horton v. McCarty, 53 Me. 394 ; Washington Ice Co. v. Webster, 62 Me. 341 ; Clark v. N. Y. Life Ins. Co., 7 Lans. (N. Y.) 322 ; Groat v. Story, 44 Vt. 200 ; Weeks v. Wright, 25 N. Y. 153 ; Ellis v. Deadman, 4 Bibb (Ky.), 466 ; Parker v. Painter, 123 Mass. 785 ; Hodges v. Howard, 5 R. I. 149 ; Dawes v. Shields, 26 Wend. (N. Y.) 341 ; May v. Ward, 134 Mass. 187 ; Riley v. Williams, 123 id. 506 ; Buck v. Pickwell, 27 Vt. 157 ; Farwell v. Mather, 10 Allen (Mass.), 322 ; Merton v. Dean, 13 Met. (Mass.) 385 ; Elfe v. Gadsden, 2 Rich. L. (S. C.) 373 ; Oakman v. Rogers, 120 Mass. 214 ; Lee v. Hills, 66 Ind. 474 ; Carter v. Hamilton, 11 Barb. (N. Y.) 147 ; Pitcher v. Hennessey, 48 N. Y. 415. It need be signed only by the party to be charged. Argus Co. v. Albany, 55 N. Y. 495 ; Beckwith v. Talbot, 95 U. S. 289 ; Scarlett v. Stein, 40 Md. 512 ; Williams v. Morris, 95 U. S. 444 ; Nesham v. Selby, L. R. 7 Ch. 406 ; Jenness v. Mount Hope Iron Co., 53 Me. 20 ; Smith v. Surman, 9 B. & C. 561 ; Williams v. Bacon, 2 Gray (Mass.), 387 ; Bailey v. Sweeting, 9 B. & C. 843 ; McLean v. Nicoll, 7 H. & N. 124.

It is only necessary that the essential terms of the contract should be evidenced by some writing which is ratified by the party to be charged under his own signature, or that of an authorized agent; and, as before stated, the *form* of the writing is not material, but any writing or number of written documents may be used to constitute a memorandum under the statute, if they are connected with each other by proper reference. The requisite written evidence of the contract may be established through the medium of separate documents containing references to each other. Any printed papers or communications in writing which may have passed between the parties, forming on the face of them *part of one connected transaction*, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement" within the statute. Bird v. Blosse, 2 Ventr. 361 ; Dobell v. Hutchinson, 3 Ad. & El.

355; *Home v. Booth*, 4 Sc. N. R. 559. But the terms of the agreement must appear upon the face of the written instruments themselves, when placed in juxtaposition, and cannot be established in any way through the medium of oral testimony. *Coe v. Duffield*, 7 Moore, 252; *Stead v. Liddard*, 1 Bing. 4; *Kenworthy v. Schofield*, 2 B. & C. 945; *Ridgeway v. Wharton*, 22 Law T. R. 265. The note or memorandum of the agreement for the sale and purchase of lands, or of any interest in or concerning them, need not be drawn up in technical language, or in words of form, but there must be written evidence of an *aggregatio mentium*, or mutual agreement, on the part of the vendor and purchaser to sell and to buy; and both the subject-matter of the sale and the price to be paid for it must be specified. It would not be sufficient to say, "I agree to sell A. B. my lands," without specifying the terms or the price, and if those could be supplied by oral evidence, we should let in all the mischief against which the Statute of Frauds was meant to guard, — viz., of having important parts of the contract proved by oral evidence. BAYLEY, J., in *Saunders v. Wakefield*, 4 B. & Ald. 601; *Ogilvie v. Foljambe*, 3 Mer. 53. If upon negotiations for the purchase and sale of an estate, the owner writes a letter which amounts to a distinct offer to sell the property upon certain terms, and the party to whom the letter is addressed answers it and accepts the offer within a reasonable period, the contract is complete, and an action may be maintained upon it at common law, or the owner may be compelled to perform it *in specie* in equity. *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Dunlop v. Higgins*, 1 H. L. C. 381. But if there has not been a clear offer and acceptance of one and the same set of terms, if the property has not been clearly described and defined, and any material particulars are left unsettled between the parties, there is not a concluded contract capable of supporting an action, or a bill for specific performance. *Kennedy v. Lee*, 3 Mer. 451; *Thomas v. Blackman*, 1 Coll. 312. Where a draft agreement had on the back of it, "We approve of this draft," and this was signed by the intended parties to the agreement, it was held that it merely amounted to evidence of something they intended to agree to, and not to an actual agreement. "If the words," observes LORD TENTERDEN, "imported an agreement, there would never be any necessity for any other instrument." *Doe v. Pedgriph*, 4 C. & P. 312. "Still," observes SIR E. SUGDEN, "where the parties themselves not being professional persons sign such a memorandum, it is a question to be decided in each case whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement." Sugd. Vend. 129. "It is not necessary that the note in writing should be contemporary with the agreement. It is sufficient if it has been made at any time before action is brought thereon, and adopted by the party afterwards, and then anything under the hand of the party expressing that he had entered into the agreement will satisfy the statute, which was only intended to protect persons from

having oral agreements imposed upon them." *Shippey v. Derrison*, 5 Esp. 192.

If it relates to a bargain for the sale of goods, it must state the names of the contracting parties or their agents: *Champion v. Plummer*, 4 B. & P. 254; *Graham v. Musson*, 5 Bing. (N. s.) 605; 7 Sc. 769; *Sherburne v. Shaw*, 1 N. H. 157; *Nichols v. Johnson*, 10 Conn. 192; *Godet v. Cowdry*, 1 Duer (N. Y.), 132; and the price to be paid, if the price was fixed and agreed upon at the time of the making of the contract: *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Smith v. Arnold*, 5 Mas. (U. S.) 414; *Ide v. Stanton*, 15 Vt. 685; *Adams v. McMillan*, 7 Port. (Ala.) 73. But if no price was positively and definitely fixed and agreed upon, the note or memorandum will be sufficient, in the case of the sale of a chattel, without any statement of price, and the law will infer that a reasonable price was to be paid. *Hoadley v. Maclaine*, 10 Bing. 482; *Acebal v. Levy*, ib. 227, 376; *Valpy v. Gibson*, 4 C. B. 864; 16 Law J. C. P. 248. It is not necessary that all the minutiae and particulars of the contract should appear upon the face of the written memorandum; any note, or an entry in a book or ledger, acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the purchaser or his agent, will take the case out of the statute. The contract may be authenticated and established through the medium of bills of parcels, entries in books, letters, and separate writings, *provided they refer to each other and to the same persons and things, and manifestly relate to the same contract and transaction*. *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennett*, 3 Taunt. 169. Where goods were sold by auction to an agent acting on behalf of an undisclosed principal, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, it was held, that the entry in the catalogue and a letter afterwards written by the principal to the agent, recognizing the purchase, might be coupled together to constitute and establish the requisite written memorandum of the contract. *Phillimore v. Barry*, 1 Campb. 513. And where a buyer wrote to the seller: "I give you notice that the corn you delivered to me, in part-performance of my contract with you for one hundred sacks of good English seconds flour, at 45s. per sack, is so bad that I cannot make it into salable bread." And the seller replied: "I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract as far as it has gone." It was held that the first letter and the answer might be coupled together, and incorporated, and were sufficient evidence in writing to satisfy the terms of the Statute of Frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned and described in the buyer's letter. *Jackson v. Lowe*, 1 Bing. 9.

It is not necessary that the writings should be signed by the party to be charged, *if they were in existence before the writing which is signed by him was executed*: *Wood v. Midgley*, 5 De G. M. & G. 41; *Jackson v. Lowe*,

1 Bing. 9; *Rishton v. Whatmore*, 8 Ch. Div. 467; *Dobell v. Hutchinson*, 3 Ad. & El. 371; *Williams v. Jordan*, 6 Ch. Div. 517; *Scarlett v. Stein*, 40 Md. 512; *Drury v. Young*, 58 id.; *Mayer v. Adrian*, 77 N. C. 83; *Washington Ice Co. v. Webster*, 62 Me. 341; *Williams v. Morris*, 95 U. S. 444; *Briggs v. Munchon*, 56 Mo. 467; *Tallman v. Franklin*, 14 N. Y. 584; *Kronheim v. Johnson*, 7 Ch. Div. 60; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Ridgway v. Ingram*, 50 Ind. 145; and so many of them as of themselves show a relation to each other may be taken together as a memorandum. *Buxton v. Rust*, L. R. 7 Exch. 279; *Lerned v. Wannemacher*, 9 Allen (Mass.), 412; *Beckwith v. Talbot*, 95 U. S. 289; *Ide v. Stanton*, 15 Vt. 685; *Work v. Cawhick*, 81 Ill. 317; *Thayer v. Luce*, 22 Ohio St. 62; *Peabody v. Speyers*, 56 N. Y. 230. But not otherwise, as parol or extrinsic evidence is not admissible to connect them. *Boardman v. Spooner*, 13 Allen (Mass.), 353; *Stocker v. Partridge*, 2 Rob. (N. Y.) 193; *Morton v. Dean*, 13 Met. (Mass.) 385; *Johnson v. Buck*, 35 N. J. L. 338; *Freeport v. Bartol*, 3 Me. 340; *Schafer v. Farmer's Bank*, 59 Penn. St. 144; *Johnson v. Kellogg*, 7 Tenn. 262; *Wiley v. Robert*, 27 Mo. 388; *Clark v. Chamberlin*, 112 Mass. 19; *Ridgway v. Ingram*, 50 Ind. 145; *O'Donnell v. Seeman*, 43 Me. 158; *Jacob v. Kirk*, 2 Moor. Ry. 221; *Hinde v. Whitehouse*, 7 East, 558; *Counnins v. Scott*, L. R. 20 Eq. 11; *Tawney v. Crowther*, 3 Bro. C. C. 318; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Jackson v. Lowe*, 1 Bing. 9; *Coles v. Trecothick*, 9 Ves. 234. And it is sufficient, if the writing which is signed *admits* the contract, there being a memorandum thereof in writing, previously executed by the other party, although it is a mere request to be absolved therefrom. *Cave v. Hastings*, 45 L. T. Rep. n. s. 348. A stated account in which the vendor charges himself with the price of land: *Bourland v. County of Peoria*, 16 Ill. 538; *Barry v. Coombs*, 1 Pet. (U. S.) 640; a receipt for money, or a bill of parcels: *Williams v. Morris*, 95 U. S. 444; *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 2; *Evans v. Prothero*, 1 De G. M. & G. 572; *Ellis v. Deadman*, 4 Bibb (Ky.), 466; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Batturs v. Sellers*, 5 H. & J. (Md.) 117; *Saunderson v. Jackson*, 2 B. & P. 238; *Drury v. Young*, 58 Md. 546, may, if signed by the party to be charged, or recognized by some other writing under his hand, amount to a sufficient memorandum: *Barickman v. Kuykendall*, *ante*; *Cosack v. Descourdes*, 1 McCord (S. C.), 425; *Shooftstall v. Adams*, 2 Grant (Penn.), 209; provided it contains a description of the property sold, and the essential terms of the agreement, and this is the rule both as to chattels and land. *Sherburne v. Shaw*, 1 N. H. 157; *Stafford v. Lick*, 10 Cal. 12; *Sheid v. Stamps*, 2 Sneed (Tenn.), 172; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *Ferguson v. Storer*, 33 Penn. St. 411; *Nichols v. Johnson*, 10 Conn. 192. But a memorandum, in whatever form, which does not in itself, or by reference to other *written* papers, contain all the essential terms of the contract as well as a sufficient description of the property, is not sufficient. *McCarty v. Kyle*, 4 Cold. (Tenn.) 348; *Knox v. King*, 36 Ala. 367; *Doty v. Wilder*, 15 Ill. 407;

White v. Watkins, 13 Mo. 423; *Kurtz v. Cummings*, 24 Penn. St. 35. But, to comply with the statute, the memorandum need only contain the *substance* of the contract, and need not set forth all the details or particulars. It is enough if the names of the parties, the price (if it has been agreed upon), such a description of the property that it can be identified, and such other special terms, if any, as have been agreed upon are set forth, so as to make a complete agreement without the aid of parol evidence. *Knox v. King*, 36 Ala. 367; *Doty v. Wilder*, 15 Ill. 407; *Ives v. Hazard*, 4 R. I. 4. If terms of credit are agreed upon, they should be stated in the memorandum, otherwise it will be treated as a sale for cash. *Wright v. Weeks*, 3 Bos. (N. Y.) 372; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Elfe v. Gadsden*, 2 Rich. L. (S. C.) 373; *Smith v. Jones*, 7 Leigh (Va.), 165; *Fessenden v. Mussey*, 11 Cush. (Mass.) 127. So if a time for the delivery of the goods is agreed upon, it should be stated. *Davis v. Shields*, 26 Wend. (N. Y.) 341. So if the goods are warranted as to quality. *Newberry v. Wall*, 65 N. Y. 454; *Smith v. Dallas*, 35 Ind. 255; *Peltier v. Collins*, 3 Wend. (N. Y.) 459. So if a special time for delivery has been agreed upon, it must be stated in the memorandum or it will be treated as a contract to deliver at once. *Williams v. Robinson*, 73 Me. 4. In the case of a lease, or rather an agreement for a lease, the *term* should be stated in the memorandum, and cannot be shown by parol evidence. *Clarke v. Fuller*, 16 C. B. (N. S.) 24; *Abeel v. Radcliffe*, 13 Johns. (N. Y.) 297; *Riley v. Williams*, 123 Mass. 506; *Hodges v. Howard*, 5 R. I. 149; *Parker v. Tainter*, 123 Mass. 185; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 79.

For a full discussion of the questions arising under this statute see Wood's Statute of Frauds, chaps. 7 and 13; Reed on Statute of Frauds, and Browne on Statute of Frauds.

NOTE 98. See Note 97.

NOTE 99. See Note 97.

NOTE 100. **Sale of Goods.** — The Statute of Frauds in most, if not in all the States, provides that all contracts for the sale of goods beyond a certain value shall be void *unless*, 1st, the buyer shall accept part of the goods, or shall actually receive them; *or*, 2d, shall give something in earnest or in part payment; *or*, 3d, that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

In some of the States *choses in action*, as bills, notes, stocks, &c., are held not to be "goods" within the meaning of the statute, and consequently contracts relating to the sale of them does not come within its provisions. *Hudson v. Weir*, 29 Ala. 294; *Beers v. Crowell*, Dudley (Ga.), 28; *Whittemore v. Gibbs*, 24 N. H. 484; *Vawter v. Griffin*, 40 Ind. 573; *Kutz v. Fleisher*, 67 Cal. 93; *Johnston v. Trask*, 40 Hun (N. Y.), 415;

while in others they are held to be "goods," &c. and a contract relating to their sale within the statute: *North v. Forrest*, 15 Conn. 400; *Fay v. Wheeler*, 44 Vt. 292; *Calvin v. Williams*, 3 H. & J. (Md.) 38; *Gooch v. Holmes*, 41 Me. 323; *Somerby v. Buntin*, 118 Mass. 279; *Eastern R. R. Co. v. Benedict*, 10 Gray (Mass.), 212; *Tisdale v. Hains*, 20 Pick. (Mass.) 9; *Boardman v. Cutter*, 128 Mass. 9; *Riggs v. Magruder*, 2 Cranch (U. S. C. C.), 143; while in most of them the statute itself has settled this question by including "*things in action*," and in others contracts relating to the sale of personal property do not come within the statute at all.

As to what constitutes a payment of *earnest*, it may be said that it must be something of value, as *money* or its equivalent, although the amount may be nominal. , *Artcher v. Zeb*, 5 Hill (N. Y.), 200; *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *Howe v. Hayward*, 108 Mass. 54. *One penny*, *Noy's Max.* 87, or even a *halfpenny*, *Bach v. Owen*, 5 T. R. 409, has been held sufficient.

Part payment must be made in money or its equivalent, and must be payment of a part of the purchase money of the very goods purchased: *Organ v. Stewart*, 60 N. Y. 413; and generally must be made at the time the contract is entered into: *Gault v. Brown*, 48 N. H. 183; *Whitwell v. Wyer*, 11 Mass. 6; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; or afterwards upon a restatement of the bargain. *Hunter v. Wetzell*, 84 N. Y. 549; *Bigsell v. Balcom*, 39 id. 275; *Hawley v. Keeler*, 54 id. 114; *Noakes v. Morey*, 30 Ind. 103; *Parker v. Steward*, 34 Vt. 127; *Bates v. Cheesboro*, 36 Wis. 636; *Paine v. Fulton*, 34 id. 83; *Webster v. Zeilley*, 52 Barb. (N. Y.) 482. But see *contra*, *Thompson v. Alger*, 12 Met. (Mass.) 428.

A distinction is drawn between a sale of things *in esse* and those which are to be afterwards made. In the one case, the contract is for a sale of goods, while in the other, it is treated as a contract for work and labor. See Wood on Statute of Frauds, chap. 11; also *Wolfenden v. Wilson*, 33 U. C. Q. B. 442; *Passaic Manuf. Co. v. Hoffman*, 3 Daly (N. Y. C. P.), 495; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379; *Pitkin v. Noyes*, 48 N. H. 294; *Prescott v. Locke*, 51 id. 94. Merely *executory* contracts are treated in all the States as within the statute, and the rule is not changed by the circumstance that the goods are not ready to be delivered: *Bennett v. Nye*, 4 Greene (Iowa), 410; *Reutch v. Long*, 27 Md. 188; *Downs v. Ross*, 25 Wend. (N. Y.) 270; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Kirby v. Johnson*, 22 Mo. 354; *Joy v. Schloss*, 12 Daly (N. Y. C. P.), 533; *Donnell v. Hearn*, 12 Daly (N. Y. C. P.), 230; *Mead v. Case*, 33 Barb. (N. Y.) 202; questioned in *Bates v. Castor*, 1 Hun (N. Y.), 400; *Cooke v. Millard*, 5 Lans. (N. Y.) 243; *Mixer v. Howarth*, 21 Pick. (Mass.) 407; *Flint v. Corbitt*, 6 Daly (N. Y. C. P.), 429; *Goddard v. Binney*, 115 Mass. 450; *Finney v. Apgar*, 31 N. J. L. 270; *Prescott v. Lake*, 51 N. H. 98; *Gilman v. Hill*, 36 id. 311; *Cooke v. Millard*, 65 N. Y. 359; *Parsons v. Loucks*, 48 id. 17; *Deal v. Maxwell*, 51 N. Y. 652; *Kellogg v.*

Wetherhead, 4 Hun (N. Y.), 373 ; Bronson v. Wyman, 10 Barb. (N. Y.) 406 ; Courtwright v. Stewart, 19 id. 455 ; Seymour v. Davis, 2 Sandf. (N. Y.) 239 ; Miller v. Fitzgibbons, 9 Daly (N. Y. C. P.), 505 ; Wright v. O'Brien, 5 id. 84 ; Bennett v. Hull, 10 Johns. (N. Y.) 364 ; Mead v. Case, 33 Barb. (N. Y.) 202 ; Parker v. Schenck, 28 id. 38 ; Donovan v. Wilson, 26 id. 138 ; Crookshank v. Burrill, 18 John. (N. Y.) 58 ; Kilmore v. Howlett, 48 N. Y. 569 ; Smith v. R. R. Co., 4 Keyes (N. Y.), 180 ; Fickett v. Smith, 41 Me. 68 ; Hight v. Ripley, 19 id. 137 ; Abbott v. Gilchrist, 38 id. 260 ; Cummings v. Dennett, 26 id. 397 ; Crockett v. Scribner, 64 id. 447 ; Meincke v. Falk, 55 Wis. 447 ; Lamb v. Crafts, 12 Met. (Mass.) 356 ; Gardner v. Joy, 9 id. 177 ; Clark v. Nichols, 107 Mass. 547 ; Waterman v. Meigs, 4 Cush. (Mass.) 497 ; May v. Ward, 134 Mass. 84 ; Atwater v. Hough, 29 Conn. 508 ; Gorham v. Fisher, 30 Vt. 428 ; Allen v. Jarvis, 20 Conn. 38 ; Suter v. Pullin, 1 S. C. 373 ; Ellison v. Brigham, 38 Vt. 64 ; Phipps v. McFarlane, 3 Minn. 109 ; Cason v. Chesley, 6 Ga. 584 ; O'Neil v. N. Y. Mining Co., 3 Nev. 141. The rule adopted in some of the States, notably in Massachusetts, New Jersey, and Wisconsin, is that a mere contract to manufacture an article and furnish materials, such as are *usually* manufactured by the vendor, is treated as a sale, and within the statute. Clark v. Nichols, 107 Mass. 547 ; Gardner v. Joy, 9 Met. (Mass.) 177 ; Waterman v. Meigs, 4 Cush. (Mass.) 497 ; Lamb v. Crafts, 12 Met. (Mass.) 356 ; Meincke v. Falk, 55 Wis. 427 ; 42 Wis. 722 ; Finney v. Apgar, 31 N. J. L. 270. But where a special order is given for the manufacture of an article, *different from that usually manufactured for the general market*, according to directions given by the purchaser, it is a contract for work, labor, and materials, and not of sale, and not within the statute. Goddard v. Binney, 115 Mass. 450 ; 15 Am. Rep. 112 ; Mixen v. Haworth, 21 Pick. (Mass.) 207.

In most of the States the rule is that, *where the work, labor, and skill to be bestowed upon an article is of the essence of the contract*, it is a contract for work and labor. Allen v. Jarvis, 20 Conn. 38 ; Brown v. Allen, 35 Iowa, 306 ; Gorham v. Fisher, 30 Vt. 428 ; Ellison v. Brigham, 38 id. 64 ; Atwater v. Haugh, 29 Conn. 508 ; Reutch v. Long, 27 Md. 188 ; Cason v. Chesley, 6 Ga. 554 ; Phipps v. McFarlane, 3 Minn. 109 ; Luter v. Pullin, 1 S. C. 273 ; Deal v. Maxwell, 51 N. Y. 652 ; Parsons v. Laucks, 48 id. 17 ; Pitkin v. Noyes, 48 N. H. 94 ; Edwards v. Grand Trunk R. R. Co., 48 Me. 379 ; Millard v. Cooke, 65 N. Y. 352 ; Hight v. Ripley, 19 Me. 137 ; Cooke v. Millard, 65 N. Y. 352. This is called the *essence* rule.

There must be both an acceptance and receipt of the goods, therefore ; while a delivery to a carrier may be sufficient as a delivery to the purchaser, yet it is not an acceptance by him within the terms of the statute. Glen v. Whittaker, 51 Barb. (N. Y.) 451 ; People v. Haynes, 14 Wend. (N. Y.) 546 ; Cross v. O'Donnell, 44 N. Y. 661 ; Outwater v. Dodge, 6 Wend. (N. Y.) 397 ; Spencer v. Hale, 30 Vt. 314 ; Rodgers v. Jones, 129 Mass. 420 ; Knight v. Mann, 118 id. 143 ; Gibbs v. Benjamin, 45 Vt. 524 ; Max-

well v. Brown, 39 Me. 98; Rodgers v. Phillips, 40 N. Y. 519; Caulkins v. Hilman, 47 N. Y. 449; Atherton v. Newhall, 123 Mass. 141.

But acceptance may precede the receipt, or *vice versa*. Morse v. Chisholm, 7 U. C. C. P. 131; Davis v. Moore, 13 Me. 421; Thompson v. Alger, 12 Met. (Mass.) 435; Bush v. Holmes, 53 Me. 417; Buckingham v. Osborn, 44 Conn. 133; Hewes v. Jordan, 39 Md. 484; McCarthy v. Knapp, 14 Minn. 127; Phillips v. Demulgee Mills, 55 Ga. 633; Danforth v. Walker, 37 Vt. 239; Richardson v. Squires, 37 Vt. 640; Amson v. Dreher, 35 Wis. 615; Pinkham v. Mattox, 53 N. H. 604; Van Woert v. R. R. Co., 67 N. Y. 538. As to what is regarded as a test of acceptance, see Dale v. Stimpson, 21 Pick. (Mass.) 384; Shepard v. Pressey, 32 N. H. 49; Jones v. Mechanics' Bank, 29 Md. 293; Knight v. Mann, 118 Mass. 143; Marsh v. Rouse, 44 N. Y. 643; Shindler v. Houston, 1 id. 261; Remick v. Sanford, 120 Mass. 316; Stone v. Browning, 51 N. Y. 211; Calkins v. Lockwood, 17 Conn. 155; Green v. Merriam, 28 Vt. 301; Bass v. Walsh, 39 Mo. 192; Safford v. McDonough, 120 Mass. 290; Hawley v. Keeler, 53 N. Y. 114; Johnson v. Cuttle, 105 Mass. 449; Bowens v. Anderson, 49 Ga. 143; Wylie v. Kelley, 41 Barb. (N. Y.) 594; Garfield v. Paris, 95 U. S. 557; Ham v. VanOrden, 4 Hun (N. Y.), 709; Brabin v. Hyde, 32 N. Y. 519; Boardman v. Spooner, 13 Allen (Mass.), 357; Brewster v. Taylor, 63 N. Y. 587; Dooley v. Eilbert, 47 Mich. 615; Atwood v. Lucas, 53 Me. 508.

Acceptance of a sample amounts to acceptance of the goods, when it is accepted by the vendee as a part of the bulk of the goods, and was taken by him to make up the whole amount. Smith v. Milliken, 7 Lans. (N. Y.) 326; Moore v. Love, 57 Miss. 565; Atherton v. Newhall, 123 Mass. 141; Remick v. Sanford, 120 Mass. 309. There may be a constructive acceptance, and as to what constitutes, see Frostburgh Mining Co. v. N. E. Glass Co., 9 Cush. (Mass.) 118; Simpson v. Krummick, 28 Minn. 352; Pinkham v. Mattox, 53 N. H. 605; Taylor v. Mueller, 30 Minn. 343; Williams v. Evans, 39 Mo. 201; Wartman v. Breed, 117 Mass. 18; Sawyer v. Nichols, 40 Me. 212; Borrowscale v. Bosworth, 99 Mass. 381; Stone v. Browning, 68 N. Y. 598; Denny v. Williams, 5 Allen (Mass.), 1; Shindler v. Houston, 1 N. Y. 261; Hallenbeck v. Cochran, 20 Hun (N. Y.), 416; Good v. Curtis, 31 How. Pr. (N. Y.) 4.

Acceptance must be found from the *acts* of the party, and cannot be found from mere words. There must be some act in reference to the property, or dealing therewith, *which the vendee would only have authority to do as owner*. Hewes v. Jordan, *ante*; Castle v. Swooner, 6 Exch. 832; Holmes v. Harkins, 9 id. 755; Clarke v. Marriott, 9 Gill (Md.), 331; Bacon v. Eccles, 43 Wis. 227; Damon v. Osborn, 1 Pick. (Mass.) 476; Packard v. Dunsmore, 11 Cush. (Mass.) 282; Gray v. Davis, 10 N. Y. 285; Morton v. Tibbetts, 15 Q. B. 428; Mason v. Whitbeck, 35 Wis. 164; Allard v. Greasart, 61 N. Y. 1. The change of possession must be such as to deprive the vendor of his lien. Walden v. Murdock, 23 Cal. 540; Dyer v. Libby, 61 Me. 45; Rappleyee v. Adey, 65 Barb. (N. Y.) 589; Byasse v.

Reese, 4 Met. (Ky.) 372. The acceptance may be by an agent. *Snow v. Warner*, 10 Met. (Mass.) 132; *Rogers v. Gould*, 6 Hun (N. Y.), 229; *Berkley v. R. R. Co.*, 71 N. Y. 205; *Spencer v. Hale*, 30 Vt. 314; *Barney v. Brown*, 2 id. 374; *Field v. Runk*, 22 N. J. L. 71; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. A carrier has no authority to accept. *Keimert v. Meyer*, 62 Ind. 587; *Krundler v. Ellison*, 47 N. Y. 36; *Cross v. O'Donnell*, 44 N. Y. 661; *Johnson v. Cuttle*, 105 Mass. 447; *Dunmead v. Glass Co.*, 30 Ga. 637; *Grimes v. VanVechten*, 20 Mich. 410; *Hausman v. Nye*, 62 Ind. 485; *Lloyd v. Wright*, 25 Ga. 212; *Shepherd v. Pressey*, 32 N. H. 49; *Marsh v. Hyde*, 3 Gray (Mass.), 33; *Townsend v. Hargreaves*, 118 Mass. 325.

If there has been such a change of possession as destroys the vendor's *general lien*, it is sufficient, although he retains a special or contractual lien. *Cross v. O'Donnell*, 44 N. Y. 661; *Pinkham v. Mattox*, 53 N. H. 600. There may be a symbolical delivery, which will be sufficient, although the goods still remain in the possession of the vendor. *Barrett v. Goddard*, 3 Mas. (U. S.) 107; *Means v. Williamson*, 37 Me. 556; *Green v. Merriam*, 28 Vt. 801; *Wild v. Came*, 98 Mass. 152; *Webster v. Anderson*, 42 Mich. 554; *Arnold v. Delano*, 4 Cush. (Mass.) 40; *Sloan Saw Mill Co. v. Guttshall*, 3 Col. 8. As where they are ponderous and incapable of manual delivery: *Atwell v. Miller*, 6 Md. 10; *Cooke v. Chapman*, 6 Ark. 197; *Jordan v. James*, 5 Ohio, 88; *Leisherness v. Berry*, 38 Me. 83; *Peoples' Bank v. Gridley*, 91 Ill. 457; *Taylor v. Richardson*, 4 Houst. (Del.) 300; *Shurtleff v. Willard*, 19 Pick. (Mass.) 210; *Adams v. Foley*, 4 Clarke (Iowa), 52; *Hayden v. Dunet*, 53 N. Y. 426; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Leonard v. Davis*, 1 Black (U. S.), 476; *King v. Jermain*, 35 Ark. 190; *Pickett v. Reed*, 31 Ark. 131; *Boynton v. Veazie*, 24 Me. 286; *Benford v. Schell*, 55 Penn. St. 393; *Gray v. Davis*, 10 N. Y. 285; *Clark v. Draper*, 19 N. H. 419; and nothing remains to be done to complete the sale. *Dunlop v. Perry*, 5 Ill. 327; *Bancher v. Warren*, 33 N. H. 183; *Wood v. McGee*, 7 Ohio, 127; *Ockington v. Richey*, 41 N. H. 275; *R. R. Co. v. McMahon*, 38 N. J. L. 537; *McClung v. Kelly*, 21 Iowa, 508.

The note or memorandum required by the statute is sufficient if it states the essential elements of the contract, however bungling in form. The statute did not contemplate a formal contract, but only such a note thereof as men in the hurry of business would be likely to make. TINDAL, C. J., in *Acebal v. Levy*, 4 M. & S. 220. But it must contain all the elements of the contract; and parol evidence is not admissible to add to or detract from it. *Reid v. Kenworthy*, 25 Kan. 701; *Lee v. Hills*, 6 Ind. 474; *Barry v. Coombs*, 1 Pet. (U. S.) 640. In an Indiana case, *Lee v. Hills*, 66 Ind. 474, in an action against L. to recover for goods sold and delivered, a memorandum which was written on a bill-head of L., and, by an averred mistake, omitted the word "sold" before L.'s name, was put in evidence to support the contract, and the defendant having, in his answer and offer

of set-off, denied delivery, &c., the writing was held not to be a "note or memorandum in writing of the bargain," within the Statute of Frauds, and that parol evidence was not admissible to supply the word. In *Wierner v. Whipple*, 53 Wis. 298, it was held that a valid memorandum is not open to parol proof to explain, vary, or change its terms. See also *Peet v. Railroad Co.*, 19 Wis. 118; *Whiting v. Gould*, 2 id. 552; *Lowber v. Connit*, 36 id. 176; *Hubbard v. Marshall*, 50 id. 322; *Shultze v. Coon*, 51 id. 416; *Meyer v. Evereth*, 4 Camp. 22; *Meres v. Ansell*, 3 Wil. 375; *Gardiner v. Gray*, 4 Camp. 144; *Grafton v. Cummings*, 99 U. S. 100. A memorandum cannot be partly in writing and partly by parol; consequently every essential part of the agreement must be contained therein. *Wright v. Weeks*, 25 N. Y. 153.

There is a distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds. The effect of the statute is, that although there is a contract which is good and valid, no action can be maintained upon it, if made by parol only, unless there be a note or memorandum in writing of the contract, *signed by the party to be charged*. *Ridgway v. Wharton*, 6 H. L. 305; *Bailey v. Sweeting*, 9 C. B. n. s. 859. The memorandum is not the contract itself, but the evidence thereof, which the statute has made indispensable: *Bird v. Munroe*, 66 Me. 337; *Sievwright v. Archibald*, 17 Q. B. 107; *Bill v. Boment*, 9 M. & W. 36; *Fricker v. Thomlinson*, 1 M. & G. 772; *Gibson v. Holland*, L. R. 1 C. P. 1; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. Div. 314; *Parton v. Crafts*, 33 L. J. C. P. 189; *Barkworth v. Young*, 4 Drew, 1; *Hart v. Carroll*, 85 Penn. St. 508; *Lerned v. Wannemacher*, 9 Allen (Mass.), 412; *Williams v. Bacon*, 2 Gray (Mass.), 287; *Ide v. Stanton*, 15 Vt. 685; *Benziger v. Miller*, 50 Ala. 206; *Batturs v. Sellers*, 5 H. & J. (Md.) 117; *Old Colony R. R. Co.*, 6 Gray (Mass.), 25; *Lanz v. McLaughlin*, 14 Minn. 72; *Mizell v. Burnett*, 4 Jones L. (N. C.) 249; *Thayer v. Luce*, 22 Ohio St. 62; and therefore must be such as to evidence every essential particular of the contract: *Lang v. Henry*, 54 N. H. 57; *Shaw v. Finney*, 13 Met. (Mass.) 453; *Ide v. Stanton*, 15 Vt. 685; *Wood v. Davis*, 82 Ill. 311; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Ives v. Hazard*, 4 R. I. 14; *Norris v. Blair*, 39 Ind. 90; *Oakman v. Rogers*, 120 Mass. 214; *Lee v. Hills*, 6 Ind. 474; *Hazard v. Day*, 14 Allen (Mass.), 48; *Trevor v. Wood*, 36 N. Y. 307; *Townsend v. Hargreaves*, 118 Mass. 325; *Smith v. Jones*, 66 Ga. 338; *Ullman v. Meyer*, 10 Abb. (N. Y.) N. C. 281; *Knox v. King*, 36 Ala. 367; *Kurtz v. Cummings*, 24 Penn. St. 35; *McCarty v. Kyle*, 4 Cold. (Tenn.) 348; *White v. Watkins*, 13 Mo. 423; *Doty v. Wilder*, 15 Ill. 407; *Grant v. Story*, 44 Vt. 200; *Clark v. N. Y. Life Ins. Co.*, 7 Lans. (N. Y.) 322; *McElroy v. Buck*, 35 Mich. 434; *Wright v. Weeks*, 25 N. Y. 153; *Whelan v. Sullivan*, 102 Mass. 204; *Frank v. Miller*, 38 Md. 450; *Scanlan v. Geddes*, 112 Mass. 15; *Mead v. Parker*, 115 Mass. 413; *Slater v. Smith*, 117 Mass. 96; *Clark v. Chamberlin*, 112 Mass. 250. In the case of a written contract, the statute has no application.

In the case of other contracts, the compliance may be proved by part payment or part delivery, or memorandum in writing. Where a memorandum in writing is to be proved in compliance with the statute, it differs from a contract in writing in that *it may be made at any time after the contract, and before action is brought*. It is not necessary that the memorandum should be contemporaneous with the contract, but it is sufficient if it has been made at any time afterwards, *and then anything under the hand of the party sought to be charged, admitting that he had entered into the agreement*, will be sufficient to satisfy the statute, which was only intended to protect parties from having parol agreements imposed upon them. *Shippey v. Derrison*, 5 Esp. 193; *Bailey v. Sweeting*, 9 C. B. N. S. 857; *Tawney v. Crowther*, 3 Bro. C. C. 161; *Bradford v. Roulston*, 8 Ir. C. L. N. S. 468; *Webster v. Zeiley*, 52 Barb. (N. Y.) 482; *Lerned v. Wannemacher*, 9 Allen (Mass.), 416; *Sanborn v. Chamberlin*, 101 Mass. 416. It is the uniform doctrine of the courts of this country and England that it is a sufficient compliance with the Statute of Frauds if only "the party charged" shall have signed the memorandum or agreement, whether the other party sign or not. *Williams v. Tucker*, 47 Miss. 678; 1873, *Marqueze v. Caldwell*, 48 Miss. 23; *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. (N. Y.) 444. A written proposal containing the names of both parties, and signed by a duly authorized agent of the proponent, is, within the meaning of the Ohio statute of frauds, "an agreement in writing and signed," and the assent thereto may be proved by parol testimony. *Himrod Furnace Co. v. Cleveland, &c. R. R. Co.*, 22 Ohio St. 451. In *Shippey v. Derrison*, 5 Esp. 193, it appeared that the parties entered into an agreement for a lease of certain premises for fifteen years, and an attorney was employed to prepare the lease, which he did. Afterwards the defendant, finding himself unable to perform, requested the plaintiff to cancel the lease. The plaintiff consented to do this, if the defendant would reimburse him for his expenses and inconvenience in the matter, and would relinquish the agreement in writing. The defendant thereupon indorsed upon the draft of the lease the following: "I hereby request Mr. Shippey (the plaintiff) to endeavor to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for doing so this shall be a sufficient authority. J. Derrison." And this was held to be a sufficient note or memorandum in writing to satisfy the statute. This rule is forcibly illustrated in a recent English case, *Cave v. Hastings*, 45 L. T. N. S. 348. In that case, in an action for breach of a contract for the hire of a carriage for more than a year from the date of the agreement, at a specified sum per month, it was proved that the plaintiff agreed to let the carriage to the defendant; a memorandum of the terms of the agreement was signed by the plaintiff, but not by the defendant. The defendant subsequently wrote a letter to the plaintiff, desiring to terminate the agreement, in which he referred to "our arrangement for the hire of

your carriage," and "my monthly payment." It was held that the memorandum and the letter were so connected as to amount to a note or memorandum under the statute.

If the note or memorandum is signed by the party to be charged, and accepted by the other, it is sufficient. *Justice v. Long*, 42 N. Y. 493; *Thayer v. Luce*, 22 Ohio St. 62; *McCrea v. Purmont*, 16 Wend. (N. Y.) 460; *Gortrell v. Stafford*, 12 Neb. 545; *Getchell v. Jewett*, 4 Me. 350; *Barstow v. Gray*, 3 id. 409; *Small v. Quincy*, 4 id. 497; *Mason v. Decker*, 72 N. Y. 598; *McFarson's Appeal*, 11 Penn. St. 503; *Hunter v. Giddings*, 97 Mass. 41; *Cook v. Anderson*, 20 Ind. 15; *Paget v. Merritt*, 2 Caines (N. Y.), 117; *Parrish v. Koons*, 1 Parson's Cas. (Penn.) 79; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Rogers v. Saunders*, 16 Me. 92; *Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.), 25; *Ives v. Hazard*, 4 R. I. 14; *Sams v. Tripp*, 10 Rich. Eq. (S. C.) 447; *Gale v. Nixon*, 6 Caines (N. Y.), 445; *Classon v. Bailey*, 14 Johns. (N. Y.) 484; *Varley v. Shirley*, 7 Blackf. (Ind.) 452; *Lawher v. Connit*, 36 Wis. 176; *Ivory v. Murphy*, 36 Mo. 534; *Dresel v. Jordan*, 104 Mass. 412; *DeCordova v. Smith*, 9 Tex. 129; *Ward v. Kirkman*, 27 Miss. 823; *Lanz v. McLaughlin*, 14 Minn. 72; *Sanborn v. Flagler*, 9 Allen (Mass.), 474; *Argus Co. v. Albany*, 55 N. Y. 495; *McMillan v. Bentley*, 16 Grant (Ont.), 387; *Moss v. Atkinson*, 44 Cal. 3; *Steel v. Fife*, 48 Iowa, 99; *Drury v. Young*, 58 Md. 546; *Peabody v. Speyers*, 56 N. Y. 320.

The contract may be collected from several documents, as letters, telegrams, &c. *Redhead v. Cator*, 1 Starkie, 14; *Lyman v. Robinson*, 14 Allen (Mass.), 242; *Foster v. Sleeper*, 29 Ga. 294; *Montague v. Hayes*, 10 Gray (Mass.), 609; *Lerned v. Wanuemacher*, 9 Allen (Mass.), 412; *Hazard v. Day*, 14 id. 487; *Sanborn v. Chamberlain*, 101 Mass. 416; *Beckwith v. Talbot*, 2 Col. 639; *Wheeler v. Frankenthal*, 78 Ill. 124; *Moore v. Mountcastle*, 61 Mo. 424; *Cossit v. Hobbs*, 56 Ill. 231; *McConnell v. Brillhart*, 17 id. 354; *McElroy v. Buck*, 35 Mich. 434. But the memorandum must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference the writing itself becomes a part of the instrument it refers to. *Beckwith v. Talbot*, 95 U. S. 289; *Schafer v. Farmers' Bank*, 39 Penn. St. 144; *Johnson v. Kellogg*, 7 Tenn. 262; *Ide v. Stanton*, 15 Vt. 685; *Thayer v. Luce*, 22 Ohio St. 62; *Work v. Cowhick*, 81 Ill. 317; *Ridgway v. Ingram*, 50 Ind. 145; *Clark v. Chamberlain*, 112 Mass. 19; *O'Donnell v. Lehman*, 43 Me. 158; *Johnson v. Buck*, 35 N. J. L. 338; *Williams v. Morris*, 95 U. S. 444; *Scarlett v. Stein*, 40 Md. 512; *Mayer v. Adrian*, 77 N. C. 83; *Briggs v. Moundron*, 56 Mo. 467; *Morton v. Deane*, 13 Met. (Mass.) 385. In the case of a sale by auction under conditions of sale, the document signed by the auctioneer must either be attached to, or clearly refer to, the conditions, in order to constitute a valid contract. *Tallman v. Franklin*, 14 N. Y. 584; *Riley v. Farnsworth*, 116 Mass. 223; *Adams v. Scales*, 57 Tenn. 337; *Gill v. Hewitt*, 7 Bush (Ky.), 10; *Tull v. David*, 45 Mo. 444; *Johnson v. Buck*, 35

N. J. L. 358; *Bent v. Cobb*, 9 Gray (Mass.), 87; *Price v. Dorin*, 56 Barb. (N. Y.) 647; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *St. John v. Griffith*, 2 Abb. (N. Y.) 198; *Babbett v. Young*, 51 Barb. (N. Y.) 466; *Grafton v. Cummings*, 99 U. S. 100; *Bush v. Cole*, 28 N. Y. 269; *Horton v. McCarty*, 53 Me. 394; *Smith v. Arnold*, 5 Mas. (U. S.) 414; *Stafford v. Lick*, 10 Cal. 12; *Smith v. Jones*, 7 Leigh (Va.), 165; *Gill v. Hewitt*, 7 Bush (Ky.), 10; *Johnson v. Mulry*, 4 Robt. (N. Y.) 401.

NOTE 101. Incorporeals. — A patent can only be sold as provided by sec. 4898 of the General Statutes of the United States, and no person can acquire and enforce rights under it, except those who were owners during the period of infringement. *Moore v. Marsh*, 7 Wall. (U. S.) 527; *Dean v. Mason*, 20 How. (U. S.) 157. See also sec. 4896 Gen. Stats. U. S. And an assignment of an *expired* patent is void as an assignment, although it may operate as a power of attorney authorizing the assignee to recover for past infringements under it, in the name of the assignor and his assignors. *Bell v. McCullough*, 1 Bond (U. S.).

NOTE 102. Implied Contracts. — Where a person, at his request express or implied, receives a benefit from another, which is susceptible of pecuniary compensation, the law implies a promise to pay therefor; as, where a person, at the request of another, express or implied, renders services for him. So too, in nearly all express contracts, there are numerous implied contracts, which, although not incorporated in the contract, nevertheless form a part thereof, and may form the basis of a defence to the contract, or of an action, the same as though they had been written in the contract itself.

NOTE 103. Money had and received. — Where money has been received by one person from another, under such circumstances that in equity and good conscience he ought not to retain it, and which belongs to such other person, the law will imply a promise to pay it to him. *Allen v. Stinger*, 74 Ill. 119; *Prickett v. Raquemore*, 55 Ga. 235; *Calais v. Whidden*, 64 Me. 249; *Meek v. McClure*, 49 Cal. 624; *Laport v. Bacon*, 48 Vt. 176; *Briggs v. Boyd*, 56 Vt. 289; *McDonald v. Lynch*, 59 Mo. 350; *Stuart v. Sears*, 119 Mass. 143; *Lockwood v. Kelsea*, 41 N. H. 185; *White v. Miner's Bank*, 102 U. S. 658; *Hildebrand v. Nibelink*, 44 Mich. 413; *Robinson v. Ezzell*, 72 N. C. 231; *Grant Co. v. Sels*, 5 Or. 243; *Eagle Bank v. Smith*, 5 Conn. 71; *Irvine v. Hamlin*, 10 S. & R. (Penn.) 219. As, where money is paid one by mistake: *Manchester v. Burns*, 45 N. H. 482; *Young v. Stahlen*, 34 N. Y. 258; *Osgood v. Jones*, 23 Me. 212; or upon a consideration that has failed: *Leach v. Tilton*, 40 N. H. 473; *Allen v. Citizens', &c. Co.*, 22 Cal. 28; or which is void for illegality or otherwise, the person paying the money not being *in pari delicto*. *Knowlton v. Congress Spring Co.*, 57 N. Y. 518.

NOTE 104. Account stated. — In order to make an account a *stated account* within the meaning of the term, the parties must have agreed upon its correctness, either expressly: *Stebbins v. Niles*, 25 Miss. 267; *Stenton v. Jerome*, 54 N. Y. 480; *White v. Campbell*, 25 Mich. 467; *May v. Kloss*, 44 Mo. 300; or impliedly. And an implied admission that the items of an account are true, arises when a copy of it has been rendered to the party, and he retains it for an unreasonable time without objection. *Stenton v. Jerome*, *ante*; *Townley v. Dennison*, 45 Barb. (N. Y.) 400; *White v. Hampton*, 10 Iowa, 238; *Langdon v. Roane*, 6 Ala. 518; *Thorp v. Thorp*, 15 Vt. 105; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129.

NOTE 105. Damages for Breach of Contract. — The subject of damages recoverable for the breach of contract is too vast to be treated in a note. See Wood's *Mayne on Damages*, Sedgewick on *Damages*, and Sutherland on *Damages*.

NOTE 106. Specific Performance. — See Pomeroy on *Contracts*.

NOTE 107. Void Contracts. — The text expresses the doctrine held by our courts relative to this class of contracts, and, aided by the very full and satisfactory notes added by Mr. Abbott, renders it wholly unnecessary to treat the matter further.

NOTE 108. Voidable Contracts. — See Note 107.

NOTE 109. Discharge of Contracts. — A contract may be discharged by the parties thereto: *Greenwood v. Kaster*, 5 Norris (Penn.), 45; or by operation of law. *In re Pulsifer*, 14 Fed. Rep. 247; *Drew v. Smith*, 59 Me. 393.

NOTE 110. Rescission of Contracts. — A contract may be rescinded on account of fraud. *Dietz v. Sutcliffe*, 80 Ky. 650; *Gates v. Bliss*, 43 Vt. 299; *Jones v. Emery*, 40 N. H. 348; *Yeoman v. Lusley*, 40 Ohio St. 190; *Cook v. Moore*, 39 Tex. 255. But, as the party defrauded has his election whether to rescind or not: *Myton v. Thurlaw*, 23 Kan. 212; *Nealon v. Henry*, 131 Mass. 153, it is incumbent upon the party to act promptly: *Bank v. Stevenson*, 51 Ind. 594; *Cooke v. Gilman*, 34 N. H. 556; *Barfield v. Price*, 40 Cal. 535; *Byers v. Chapin*, 28 Ohio St. 300; *Jones v. Booth*, 38 id. 405; *Gates v. Bliss*, 43 Vt. 299; *Hunt v. Hardwick*, 68 Ga. 100; *Gould v. Cayuga Bank*, 86 N. Y. 75; *Samuels v. King*, 50 Ind. 527; *Pratt v. Fiske*, 17 Cal. 380; upon discovery of the fraud: *McCreary v. Parsons*, 31 Kan. 447; *Marston v. Simpson*, 54 Cal. 189; *Aaron v. Mundel*, 78 Ky. 427; *Hunt v. Banton*, 89 Ind. 38; either by giving notice to the other party of the rescission: *Parmalee v. Adolph*, 28 Ohio St. 10; or by bringing proceedings to annul it: *Thurston v. Blanchard*, 22 Pick.

(Mass.) 18; Schofield v. Holland, 37 Ind. 220. The parties to a contract may rescind at any time by mutual agreement, if they are parties in interest at the time of such rescission. Johnson v. Reed, 9 Mass. 78; Ward v. Walton, 4 Ind. 75; Barber v. Lyon, 8 Blackf. (Ind.) 218; McFadden v. O'Donnell, 18 Cal. 160; Harris v. Bradley, 9 Ind. 166; Echals v. Butler, 28 Miss. 114. And in that event, no action for a breach of the contract can be maintained by either party. Hopkins v. Sickles, Wright (Ohio), 376. So, where a contract is entire, and one party has refused to perform, the other party may rescind it, if he can put such party *in statu quo*. Lucy v. Bundy, 9 N. H. 298; Preble v. Bottom, 27 Vt. 249; Webb v. Stone, 24 N. H. 282. And the same rule prevails as to a *conditional* contract where one party refuses or neglects to perform the condition. Dodge v. Greeley, 31 Me. 343; Webster v. Enfield, 10 Ill. 298. But ordinarily, neither party to a contract can rescind it without the consent of the other. Atty.-Gen. v. Purmont, 5 Paige (N. Y.), 620; Allen v. Taunton, 19 Pick. (Mass.) 485; *nor unless both parties can be put in statu quo*: Hammond v. Buckmaster, 22 Vt. 375; Griffith v. Bank, 9 G. & J. (Md.) 424; Pettus v. Roberts, 6 Ala. 811; Brown v. Winter, 10 Ohio, 142; Conner v. Henderson, 15 Mass. 319; Chance v. Clay Co., 5 Blackf. (Ind.) 441; Allen v. Webb, 24 N. H. 278; Utter v. Stuart, 30 Barb. (N. Y.) 20; Evans v. Gale, 17 N. H. 573; Jennings v. Gage, 13 Ill. 610; Cocke v. Rucks, 34 Miss. 105; Tisdale v. Buckmore, 33 Me. 461. The party having the option to rescind must act promptly after the discovery of the ground for rescission: Lawber v. Selden, 11 How. Pr. (N. Y.) 526; Hunt v. Siger, 1 Daly (N. Y. C. P.), 209; Lawrence v. Dale, 3 Johns. Ch. (N. Y.) 23; Desha v. Robinson, 17 Ark. 228; Williams v. Ketcham, 21 Wis. 432; Fratt v. Fiske, 17 Cal. 380; Gatting v. Newell, 9 Ind. 572; Blen v. Bear River, &c. Co., 20 Cal. 602; Cook v. Gilman, 34 N. H. 556; Fisher v. Wilson, 18 Ind. 133; Shaw v. Barnhart, 17 Ind. 183; and must do so distinctly and unequivocally. The contract cannot be rescinded in part and treated as binding in part. Hendricks v. Goodrich, 15 Wis. 679; Sumner v. Parker, 36 N. H. 449; Weeks v. Robie, 42 id. 316; Jewett v. Petit, 4 Mich. 508; Clarkson v. Mitchell, 3 E. D. S. (N. Y. C. P.) 269; Raymond v. Barnard, 12 Johns. (N. Y.) 274. Notice of rescission must be given: Hooper v. Taylor, 4 E. D. S. (N. Y. C. P.) 486; and the other party must be put *in statu quo*: Stoddard v. Graham 23 How. Pr. (N. Y.) 518; Webur v. Flood, 16 Mich. 40; Potter v. Titcomb, 22 Me. 300; Tibbs v. Timberlake, 4 Litt. (Ky.) 12. The consideration cannot be retained, and a breach of the contract defended on the ground of fraud. California Steam Nav. Co. v. Wright, 8 Cal. 585; Jennings v. Gage, 13 Ill. 610; Moore v. Bare, 11 Iowa, 198. A court of equity will not rescind a contract, upon the ground of fraud even, unless the party seeking the rescission has restored, or offered to put the other party *in statu quo*, or he has been prevented from doing so by such party's fraud. Clay v. Turner, 3 Bibb (Ky.), 52; Camplin v. Burton, 2 J. J. Mar. (Ky.) 216. A contract of sale will not be set aside merely for

inadequacy of price, unless the inadequacy is so great as to furnish evidence of fraud or undue advantage: *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Howard v. Edgell*, 17 Vt. 9; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Green v. Thompson*, 1 Ired. Eq. (N. C.) 199; *Hardeman v. Burge*, 10 Yerg. (Tenn.) 202; *Ford v. Huron*, 4 Munf. (Va.) 316; *Knobb v. Lindsay*, 5 Ohio, 468; *Butler v. Haskell*, 4 Dessau. (S. C.) 651; and superiority of intellect in one of the parties is no ground for setting aside a contract upon the ground of imposition or undue advantage, if the other party has sufficient mental capacity to assent to a contract. *Thomas v. Sheppard*, 2 McCord Ch. (S. C.) 36.

LAW OF PLACE. — It is a general rule that the rights of the parties to a contract must be determined by the law of the place where the contract was made, if those laws are properly shown: *Anderson v. Dook*, 10 Ired. (N. C.) 295; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Boughton v. Bradley*, 36 Ala. 689; *Maguire v. Pingree*, 30 Me. 508; *Pegram v. Williams*, 4 Rich. (S. C.) 219; *Pitkin v. Thompson*, 13 Pick. (Mass.) 64; *Young v. Harris*, 14 B. Mon. (Ky.) 556; *Dakin v. Pomeroy*, 9 Gill (Md.), 1; *Watson v. Brewster*, 1 Penn. St. 381; *Jones v. Jones*, 18 Ala. 248; *Butler v. Meyer*, 17 Ind. 77. But if a contract is executed in one State to be performed in another, it will be construed according to the law of the State where it is to be performed: *Goddin v. Shipley*, 7 B. Mon. (Ky.) 575; *Sherman v. Gossett*, 9 Ill. 521; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Kanaga v. Taylor*, 7 Ohio St. 134. But if the contract is silent as to the place of performance, it is conclusively presumed that it was to be performed in the place where it was executed: *DeLabry v. DeLaistre*, 2 H. & J. (Md.) 191; and if it is partly to be performed in one State and partly in another, each portion will be interpreted according to the laws of the State where it is to be performed. *Pomeroy v. Ainsworth*, *ante*.

The *lex loci contractus* prevails in the interpretation of contracts, unless the parties indicate a contrary intention. *Peake v. Yeldell*, 17 Ala. 686; *Cox v. United States*, 6 Pet. (U. S.) 172; *Dorsey v. Hardesty*, 9 Mo. 157. This rule rests on the broad ground of comity of States, and will not be carried so far as to require the courts of a State to violate the settled laws or established policy of the State of the former, out of deference to foreign laws. *Crosby v. Huston*, 1 Tex. 203; *Cambridge v. Lexington*, 1 Pick. (Mass.) 506; *Martin v. Hill*, 12 Barb. (N. Y.) 631; *Cole v. Lucas*, 3 La. An. 953; *Hinds v. Bazall*, 3 Miss. 837. If, however, it is not shown by the party claiming the benefit of such foreign laws, by proper pleadings and proof, what those laws are, it will be presumed that the law is the same as that of the former. *Crosby v. Huston*, *ante*; *Bean v. Briggs*, 4 Iowa, 464; *Allen v. Watson*, 2 Hill (S. C.), 319; *Whidden v. Seeleye*, 40 Me. 247; *Fouke v. Fleming*, 13 Md. 392.

The remedy will be controlled by the laws of the State in which the remedy is sought. *Broadhead v. Noyes*, 9 Mo. 56; *Smith v. Atwood*, 3 McLean (U. S.), 545; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75;

Dundas v. Bowler, 3 McLean (U. S.), 396; *Dakin v. Pomeroy*, 9 Gill (Md.), 1; *Smith v. Spinola*, 2 Johns. (N. Y.) 198; *Gulick v. Loder*, 13 N. J. L. 68; *Brent v. Shouse*, 15 La. An. 310. These rules apply to negotiable instruments, and if a bill or note is made in one State, but is by its terms or by legal effect payable in another, then the law of the State where it is payable determines its effect, rather than that of the State where it was made. *Gaylord v. Howard*, 5 McLean (U. S.), 448; *Pryor v. Wright*, 14 Ark. 189; *Smith v. Mead*, 3 Conn. 253; *Tillotson v. Tillotson*, 34 id. 335; *Hunt v. Standart*, 15 Ind. 33; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *Bank of Orange Co. v. Colby*, 12 N. H. 520; *Peck v. Hibbard*, 26 Vt. 698; *Freemans Bank v. Ruckman*, 16 Gratt. (Va.) 126; *Raymond v. Holmes*, 11 Tex. 54.

So the acceptance of a bill of exchange is governed by the laws of the State or place wherein the bill is made payable. *Frazier v. Warfield*, 17 Miss. 220; *Bainbridge v. Wilcox*, 1 Baldw. (U. S.) 536. Compare *Mason v. Dousay*, 35 Ill. 424; *Grimshaw v. Bender*, 6 Mass. 157.

The mode of transferring a bill of exchange, payable in New York, is held to be governed by the laws of New York. *Everett v. Vendries*, 25 Barb. (N. Y.) 383.

The indorsement of a bill or note is a new contract; and is governed by the law of the State or place where the indorsement itself is made. *Dundas v. Bowler*, 3 McLean (U. S.), 397; *Cox v. Adams*, 2 Ga. 158; *Humphreys v. Powell*, 1 Ill. 231; *Bernard v. Barry*, 1 Iowa. 388; *Carlisle v. Chambers*, 4 Bush (Ky.), 268; *Trabue v. Short*, 18 La. An. 257; *Dow v. Russell*, 12 N. H. 49; *Lee v. Selleck*, 33 N. Y. 615; 32 Barb. 522; 20 How. Pr. 275; *Hatcher v. M'Morine*, 4 Dev. L. (N. C.) 122.

NOTE 111. Discharge by Operation of Law.—Where the law discharges a party from a contract, it limits the effect of the discharge to the very person, so that neither a joint nor a joint and several promisor is discharged. *Coburn v. Ware*, 25 Me. 330; *Garnett v. Roper*, 10 Ala. 842; *Cutter v. Wright*, 22 N. Y. 472; *Spalding v. Ludlow, &c., Mill*, 36 Vt. 150; *Denny v. Smith*, 18 N. Y. 567.

NOTE 112. Assignment — See Bishop on Contracts, Chap. 45, "*Assignors and Assignees*," where the author very ably and carefully treats this important topic.

NOTE 113. Covenants Running with the Land.—Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to "run with the land," so that he who has the one is subject to the other. In order to run with the land and bind the assignee it must respect the thing granted or demised, and the covenant must concern the land or estate demised. *Nesbit v. Nesbit*, 1 C. & M. (N. C.) 324; *Wheeler v. Schad*, 7 Nev. 204. A grant of a

mere privilege, as, of the right to draw water from a certain pond, is not a conveyance of land; consequently, a covenant respecting it does not run with the land, and cannot be enforced by an assignee of the grantee. *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Mitchell v. Warner*, 5 Conn. 497. And in order to run with the land, it must not only relate to the estate, *but there must also be a privity of estate between the contracting parties.* *Webb v. Russell*, 3 T. R. 402; *Tallman v. Coffin*, 4 N. Y. 134; *Columbia College v. Lynch*, 47 How. Pr. (N. Y.) 273. But the covenantee may sue, although his assignee cannot. *Stokes v. Russell*, 3 T. R. 393; Co. Litt. 384 b. Therefore, where an estate was conveyed to a trustee in fee to the use of such person as W. should appoint, and in default of appointment to the use of W., in fee, and W. covenanted in the same conveyance, for himself, his heirs and assigns, to pay a certain fee farm rent reserved out of the estate to the vendors, their heirs and assigns, it was held that the land was not bound in the hands of W.'s appointee by W.'s covenant, *for the appointee did not take the estate of W., to which his covenant was annexed, but took as if the original conveyance had been made to himself.* *Rooch v. Wadham*, 6 East, 289. A covenant by the lessor of a mine, quarry, or pit, that neither he nor his assigns shall sell any such articles as are produced from the mine, quarry, or pit, is personal and does not run with the land. *Bower v. Marshall*, 19 N. J. Eq. 537. But it has been held that a covenant, in a lease of a mill-site, by the lessor, for himself and his assigns, with the lessee and his assigns, not to erect and put in operation a rival mill during the term, runs with the land, and passes by an assignment of the lease; and the assignee may, in his own name, sue the assignee of the reversion for a breach of it. *Norman v. Wells*, 17 Wend. (N. Y.) 136. A covenant in a lease of a ferry that the lessor shall, during the existence of the term, have the right to pass toll free, is a mere personal covenant. *Morse v. Garner*, 1 Strob. (S. C.) 514. A covenant between the several owners of mills drawing water from the same dam, as to the use of the water, does not run with the land, because of a lack of privity of estate between such owners, and is not binding upon a grantee or lessee of either of the owners. *Hurd v. Curtis*, 19 Pick. (Mass.) 459. Nor does a covenant not to permit a mill to be erected on other premises than those demised: *Harsha v. Reid*, 45 N. Y. 415; or to name an arbitrator to settle disputes: *Gray v. Cuthbertson*, 4 Doug. 351; or to pay a part of the expenses of a party wall. *Brown v. McKie*, 57 N. Y. 684; *Curtis v. White*, Clarke's Ch. (N. Y.) 389; *Bluck v. Isham* (Ind.), 7 Am. L. R. U. S. 8. But *contra*, and holding that such a covenant *does* run with the land, see *Burlock v. Peck*, 2 Duer (N. Y. Superior Ct.), 90. A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. A covenant is said to run with the reversion when either the liability to perform it or the right to take advantage of it passes to the assignee of that reversion. 1 Smith L. C. 42 (4th ed.). A joint covenant with tenants in common

does not run with the land or with the reversion. *Roach v. Wadham*, 6 East, 289; *Thompson v. Hakewill*, 19 C. B. n. s. 713. Covenants personal are such whereof some person in particular shall have the benefit, or whereby he shall be charged, as, when a man covenants to do any personal thing. Bac. Abr. tit. Covenant (E), 2, 5; Shep. Touch. 161. If the lessor covenants to pay rent or repair; or if he grants to the lessee so many estovers as will repair, or as he shall burn within his house during the term, these covenants, as belonging to things appurtenant, go with the land, into whosoever hand it comes. *Martyn v. Clue*, 18 Q. B. 661. A covenant which relates to something not in being at the time of the demise, or which is merely personal or collateral to the thing demised, — as to pay a sum of money in gross, to build *de novo*, or the like, — does not run with the land, and therefore assignees are not bound, even though they be expressly named. *Spencer's Case*, 5 Coke, 16; 1 Smith L. C. 36 (2d Res.). A covenant to pay off a certain mortgage is personal, even though it is expressly stated in the lease or grant *that the covenant shall run with the land*: *Campbell v. Johnson*, 4 Dana (Ky.), 177; and the parties cannot by contract make a personal, a *real* covenant. *Doughty v. Bowman*, 11 Q. B. 444; 1 Smith L. C. 47 (4th ed.). Where the covenant relates to a thing not *in esse*, but to be done upon the land demised, the assignee is bound, if named; but if not named, he is not bound. *Tallman v. Coffin*, 4 N. Y. 134. The rule laid down in *Spencer's Case*, 5 Coke, 16, is that generally adopted, and furnishes an accurate test by which to determine what covenants do, and what do not run with the land. It is there resolved — 1st. When the covenant extends to a thing *in esse* parcel of the demise, the covenant runs with the land and binds the assignee, though not named therein. Otherwise, when it relates to a thing not in being at the time of the demise. 2d. Although the covenant extends to a thing not *in esse* at the time of the demise, yet the assignee shall be bound if *named, unless the thing to be done is merely collateral to the land and does not concern the thing demised*. 3d. In a lease of personal goods, as sheep or other cattle, a covenant by the lessee for himself and his assigns *does not* bind the assignee. Where a lease embraces both real and personal estate the covenants, as a covenant to surrender, does not, as to the personal property, run with the land. *Allen v. Culver*, 3 Den. (N. Y.) 284. Although a covenant to put fixtures into a building runs with the land, yet, as it relates to a thing not *in esse*, but to be done, an action will not lie in favor of the lessee against the lessor's assigns, the word "assigns" not being used, although it is expressly provided that the "heirs, executors, &c.," of the parties, shall be bound thereby. In *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 282, a lease like that stated above was executed, the lessor covenanting to put "counters and shelves" into the building, but the word "assigns" not being used, it was held that the lessor's assignees were not liable on the covenant, upon the principle stated in *Spencer's Case*, 3 Coke, 16 a. See also, *Gray v. Cuthbertson*, 2 Chitt. 482, where

the lessor covenanted for himself, *but not for his assigns*, to take and pay for all trees and bushes planted by the lessee, growing at the end of the term, and the lessor's assignee was held not chargeable upon the covenant, although it was admitted that if the word "assigns" had been used, liability would have existed.

A covenant by a lessor to purchase at the end of the term at a valuation all improvements, &c., made by the lessee, will bind his executors or administrators in their representative capacity, but not as assignees of the reversion. *Gorton v. Gregory*, 3 B. & S. 90; but see *Coffin v. Tallman*, 8 N. Y. 465. A lease of a house and lot with a provision that the lessor, &c., should pay at the end of the term for buildings erected by the lessee, &c., and with leave to pull down the house, and erect buildings, — *Held*, not a building or repairing lease, but that it was at the option of the lessee to pull down the old house, or to make improvements, if any, without doing so; and that the covenant ran with the land, so that the executors of one who became assignee of the term could sue for the breach. *Lametti v. Anderson*, 6 Cow. (N. Y.) 302. A covenant with the lessee, not naming his assigns, to purchase at the end of the term improvements made by him during the term, as it does not relate to anything upon the demised premises or parcel thereof and in being at the time of the lease, and the assignee of the lessee not being named, does not run with the land so as to uphold an action by the assignee. *Coffin v. Tallman*, 8 N. Y. 465. If a man leases animals, or anything personal, and the lessee covenants for himself and "his assigns" at the end of the term to deliver up the animals or things so let, or to pay such a price for them, if the lessee assigns, this covenant will not bind the assignee, for it is but a personal contract. *Spencer's Case*, *ante*.

Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties: *Esp. N. P.* 290; *Prettyman v. Wallston*, 34 Ill. 175; *D'Aquin v. Armand*, 14 La. An. 217; *Sutliff v. Atwood*, 19 Ohio St. 186; for the personal representatives of a lessee for years are his assignees. *Hornidge v. Wilson*, 11 Ad. & El. 645; *Wollaston v. Hakewill*, 3 M. & G. 297; *Hopwood v. Whaley*, 6 C. B. 744; 6 D. & L. 342; *Collins v. Crouch*, 13 Q. B. 542. If a man covenants to pay money, build a house, for quiet enjoyment or the like, and he does not in the covenant mention his executors or administrators, yet hereby his executors and administrators are bound and shall be charged. *Shep. Touch.* 178; *Williams v. Burrell*, 1 C. B. 402. In preparing covenants which are intended to run with the land, the "assigns" should always be mentioned, for though some covenants will bind them although not mentioned: *Bac. Abr. tit. Covenant (E).* 3; *Cockson v. Cock. Cro. Jac.* 125; *Tatem v. Chaplin*, 2 H. Bl. 133; *Wilkinson v. Rogers*, 12 W. R. 119; *Martyn v. Clue*, 18 Q. B. 661; and others will not bind them although mentioned: *Spencer's Case*, 5 Coke, 16; or even though it is specially pro-

vided that they shall run with the land: *Campbell v. Johnson*, 4 Dana Ky. 177; yet there is a middle class, in which assignees are bound if mentioned, but not otherwise: *Spencer's Case*, *ante*; *Paul v. Nurse*, 8 B. & C. 486; *Doughty v. Bowman*, 11 Q. B. 444; *Greenaway v. Hart*, 14 C. B. 340; *Smith L. & T.* 392 (2d ed.); and it is prudent to provide for the possibility of a covenant being held to belong to this class.

Where a covenant is for the benefit of the estate demised it runs with the land, and will extend to the assignee, though he is not named. *Lewis v. Cook*, 13 Ired. (N. C.) 193; *White v. Whitney*, 3 Met. (Mass.) 81; *Dickerson v. Holmes*, 8 Gratt. (Va.) 353; *Slater v. Rawson*, 6 Met. (Mass.) 79; *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Markland v. Crump*, 1 D. & B. (N. C.) 94; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Allen v. Culver*, 3 Den. (N. Y.) 284; *Suydam v. Jones*, 10 Wend. (N. Y.) 180. And a covenant so running with the land attaches to the land, although neither party had any interest therein when the covenant was made. *Fuller v. Eastman*, 3 Met. (Mass.) 121. And generally it may be said that an assignee of a lease is liable for the performance of every duty issuing out of the land or directly relating to it. *Post v. Kearney*, 2 N. Y. 394; *Torrey v. Wallis*, 3 Cush. (Mass.) 442; *Graves v. Porter*, 11 Barb. (N. Y.) 592; *Bac. Abr. tit. Covenant (E)*, 3; *Spencer's Case*, *ante*. A covenant to pay rent runs with the land. *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Bonesteel*, 24 Barb. N. Y. 365; *Main v. Feathers*, 21 id. 646; *Sandwith v. DeSilver*, 1 Browne Penn., 221; *Hurst v. Rodney*, 1 Wash. Va. 375. But a covenant embodied in a lease that the lessee shall pay to a third person a pre-existing debt, due from both lessor and lessee jointly to a third person, does not run with the land. The covenant is merely collateral, and does not bind the assignee of the lease. Moreover the creditor, being in no way connected with the reversion or rent, could not take advantage of such a covenant if it did run with the land. *Dolph v. White*, 12 N. Y. 296; *Parker v. Webb*, 3 Salk. 5. A covenant to pay taxes, or to repair: *Post v. Kearney*, 2 N. Y. 394; *Astor v. Miller*, 2 Paige Ch. N. Y. 68; *Dean and C. of Windsor's Case*, 5 Coke, 24; *Conan v. Kemise*, W. Jon. 245; *Smith v. Arnold*, 3 Salk. 4; *Minshull v. Oakes*, 2 H. & N. 793; *Martyn v. Clue*, 18 Q. B. 661; or to leave in repair: *Vin. Abr. Covenant (K)*, 19; *Strode v. Seaton*, 2 C. M. & R. 730; 1 *Smith L. C.* 46; *Martyn v. Clue*, *ante*; *Demorest v. Willard*, 8 Cow. N. Y. 206; *Myers v. Burns*, 33 Barb. N. Y. 401; *Shelby v. Hearne*, 6 Yerg. Tenn. 512; *Harris v. Goslin*, 3 Harr. Del. 340; *Payne v. Haine*, 16 M. & W. 541, runs with the land, for it affects the estate in the hands of any person that has it. *Buckley v. Pirk*, 1 Salk. 317; *Wakefield v. Brown*, 9 Q. B. 209; *Magnay v. Edwards*, 13 C. B. 479; 1 *Smith L. C.* 49 (4th ed.). Yet if a lessee for years covenants for himself (omitting other words) to repair the house demised, it seems in this case he is bound to repair only during his life, and his executors or administrators are not bound. *Shep. Touch.* 178. A covenant for further assurance:

Bennett v. Waller, 23 Ill. 97; Roe v. Haley, 12 East, 464; for a right of ingress and egress to and from a building: Bush v. Calis, 1 Shower, 389; Cole's Case, 1 Salk. 196; not to assign or underlet, runs with the land. Williams v. Earle, 9 B. & S. 740. In this country it has been held that a covenant not to erect a building in front of the demised premises runs with the land: Trustee v. Cowen, 4 Paige Ch. (N. Y.) 516; but in England it is held that it does not. Thomas v. Hayward, L. R. 4 Exch. 311. Where a lessee agreed to pay, in addition to the rent that had been reserved, ten per cent on the outlay which the lessor should make in improving the buildings, it was held that this was not a contract running with the land. Lambert v. Norris, 2 M. & W. 333; Hoby v. Roebuck, 7 Taunt. 157; Donellan v. Read, 3 B. & Ad. 899; Martyn v. Clue, *ante*. In England, it is held that a covenant to pay rent will not run with the rent alone: Randall v. Rigby, 4 M. & W. 135; but a contrary rule has been adopted in some of the States of this country, and such a covenant in a lease for life or years is held to run with the rent alone. Patten v. Deshon, 1 Gray (Mass.), 325; Willard v. Tallman, 2 Hill (N. Y.), 274; Demorest v. Willard, 8 Cow. (N. Y.) 206; Wollan v. Harmstead, 44 Penn. St. 492. But *contra*, Allen v. Wooley, 1 Blackf. (Ind.) 148. A covenant not to plough or to cultivate the land in a certain manner runs with the land, and therefore binds an assignee, although "assigns" are not named in the deed: Cockson v. Cock, Cro. Jac. 125; so a covenant to use the land in a husbandlike manner, and leave it in like condition: Walsh v. Watson, Esp. N. P. 295; so a covenant to lay dung on the demised land in each and every year during the continuance of the term: ——— v. Davis, MS. M. T. 42 Geo. 3; or a covenant to leave the land in a certain condition or with certain crops sown or planted. Hooper v. Clark, 8 B. & S. 150, sustains the proposition in principle. But a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee, does not run with the land, as it is only collateral to the grantor's interest in the land. Webb v. Russell, 3 T. R. 393; Stokes v. Russell, *id.* 678; Russell v. Stokes, 1 H. Bl. 562. A lease recited that the lessors were owners subject to a mortgage, the interest on which was payable at a certain place; it then demised the land for a term, the lessee yielding and paying a certain sum at that *place* in part of the interest due on the mortgage, and the lessee covenanted to pay that sum at the *place* and in the manner mentioned: *held* that this was a covenant in gross to pay an annual sum. Pargeter v. Harris, 7 Q. B. 708. A covenant that a lessee should reside on the demised premises during the term was held to extend to his assignees, though not mentioned in the covenant. Tatem v. Chaplin, 2 H. Bl. 133. So with respect to a covenant not to carry on particular trades: Hunt v. Bishop, 8 Exch. 675; Barron v. Richards, 3 Edw. Ch. (N. Y.) 96; or erect other than buildings of a certain kind, or to use them for other than certain specified purposes: St. Andrew's Church's Appeal, 67 Penn. St. 512; or a covenant to erect

a building upon demised premises: *Fisher v. Lewis*, 1 Penn. L. J. 422; or to erect and maintain a fence between adjoining lots: *Bronson v. Coffin*, 108 Mass. 174; *Duffy v. N. Y. & Erie R. R. Co.*, 2 Hilt. (N. Y. C. P.) 496; *Kellogg v. Robinson*, 6 Vt. 276; a covenant to insure when the covenant provides that the money received upon the policy shall, either wholly or in part, be expended in restoring the buildings. *Thomas v. Von Kapff*, 6 G. & J. (Md.) 372. A covenant to pull down old buildings, or parts thereof, and build new: *Harris v. Caulborn*, 3 Harr. (Del.) 338; or not to carry on an offensive trade upon the premises. *Barron v. Richards*, 3 Edw. Ch. (N. Y.) 96. A covenant by a lessee of tithes for himself and his "assigns" not to let any of the farmers in the parish have any part of the tithes, runs with the tithes, and binds the assignee. *Bally v. Wells*, 3 Wils. 25; *Brewer v. Hill*, 2 Anst. 413. A covenant to carry all the corn produced on the demised land to the lessor's mill to be ground, is a covenant which runs with the land, of which the assignee of the reversioner of the land demised and of the mill may take advantage; the suit to the mill being likened to rent, and the judgment of the court proceeding on the unity of the title to the mill and the land demised: *Vyvyan v. Arthur*, 1 B. & C. 410; or that the grantor and his heirs may grind toll free. *Dunbar v. Gumper*, 2 Yeates (Penn.), 74. A covenant for quiet enjoyment runs with the land: *Lewis v. Campbell*, 8 Taunt. 715; 3 Moo. 35, 51; *Campbell v. Lewis*, 3 B. & Ald. 392; *Noke v. Awder*, Cro. Eliz. 375, 436; 1 Smith L. C. 46 (4th ed.); *Suydam v. Jones*, 10 Wend. (N. Y.) 186; *Hunt v. Amidon*, 4 Hill (N. Y.), 345; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Heath v. Whidden*, 24 Me. 383; *Markland v. Crump*, 1 D. & B. L. (N. C.) 94; so does a covenant to produce title-deeds: *Barclay v. Raine*, 1 Sim. & S. 449; or to make further assurance: *Middlemore v. Goodhall*, Cro. Car. 503; *Kingdom v. Nottle*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; or to renew the lease. *Isteed v. Stoneley*, 1 And. 82; *Brooke v. Bulkeley*, 2 Ves. Jr. 498; *Roe v. Hayley*, 12 East, 464. So a covenant by a lessee for lives made in an underlease, that he will, on either of the *cestui que vies* dying, apply for and do his utmost endeavors to procure a renewal of the lease for another life, is a covenant which runs with the land, and therefore the assignee of the underlessee may sue on it. *Simpson v. Clayton*, 4 Bing. N. C. 758. A covenant in an underlease, whereby the lessor covenanted (not naming his assigns) to observe and perform and effectually to indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land, does not run with the land so as to make the assignee of the covenantor liable. *Doughty v. Bowman*, 11 Q. B. 444. A covenant to build a new smelting mill in lieu of an old one in a lease of mines, has been considered as a covenant which runs with the land, as it tended to the support and maintenance of the thing demised. *Sampson v. Easterby*, 9 B. & C. 505; *Easterby v. Sampson*, 6 Bing. 644. A covenant to repair and leave in repair (*inter alia*) all buildings which

should or might be thereafter erected during the term on the demised premises, is not considered as a covenant absolutely to do a new thing, but to do something conditionally, namely, that if new buildings were erected on the demised premises during the term to repair them; and, as when built they would be part of the thing demised, the assignee of the lessee would be bound by the covenant, although not named therein. *Minshull v. Oakes*, 2 H. & N. 798. A covenant by a lessor to supply houses with good water, at a rate therein mentioned for each house, runs with the land; and for a breach of it the assignee of the lessee may maintain an action against the reversioner. *Jourdain v. Wilson*, 4 B. & Ald. 266. But a covenant by a lessor (not mentioning his assigns) to pay on a valuation for all trees planted by the lessee during the term, does not run with the land so as to bind an assignee of the reversion. *Grey v. Cuthbertson*, 4 Doug. 351; 2 Chit. 482; 1 Selw. N. P. 534 (12th ed.). A covenant by a lessor, for himself and his assigns, to purchase by appraisement at the end of the term all improvements, &c., made by the lessee, will not bind the assignees of the reversion. *Gorton v. Gregory*, 3 B. & S. 90; but see *Coffin v. Tallman*, *ante*. But a covenant to pay for all improvements made upon the premises demised runs with the land: *Lockett v. Howard*, 34 Md. 121; so does a covenant to renew the lease: *Wilkinson v. Pettitt*, 47 Barb. (N. Y.) 230; *Piggot v. Mason*, 1 Paige Ch. (N. Y.) 412; *Barclay v. Steamboat Co.*, 6 Phila. (Penn.) 558; *Vernon v. Smith*, 5 B. & Ald. 11; *Hyde v. Skinner*, 2 P. Wms. 196; *Winslow v. Tighe*, 2 B. & B. 195; *Roe v. Hayley*, 12 East, 469; or that the lessee may purchase the land at his option during the term: *Hagar v. Buck*, 44 Vt. 285; *Napier v. Darlington*, 70 Penn. St. 64; *Willard v. Taylor*, 8 Wall. (U. S.) 557; as such a covenant for many purposes may be regarded as a continuation of the former term. The executors of the lessor should be charged upon such a covenant in their representative capacity, and not as assigns of the reversion. *Gorton v. Gregory*, *ante*. Where there was an exception in a lease of an entry, and liberty to wash in the kitchen, and a passage for that purpose, it was held that an action would lie against an assignee for hindering the lessor, because a covenant relating to a way or other profit appurtenant goes with the tenement, and binds the assignee. *Cole's Case*, 1 Show. 388; 1 Salk. 196. But where in a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors and assigns, not to have persons to work in the mill who were settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, nor bind the assignee of the lessee. *Mayor, &c. of Congleton v. Pattison*, 10 East, 130; and see *Walsh v. Fussell*, 6 Bing. 163. Where the lessee of a theatre by deed agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes in the theatre, no specific boxes being mentioned, and afterwards assigned his

interest in the theatre, it was held that it was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes. *Flight v. Glossop*, 2 Bing. N. C. 125. A mere personal covenant in a lease is not affected by a surrender of the lease. *Wilder v. Maine Centl. R. R. Co.*, 65 Me. 332; *Atty.-Gen. v. Cox*, 3 H. L. Cas. 240. When a covenant is broken, it becomes mere personalty, and ceases to run with the land. *Shelby v. Hearne*, 6 Yerg. (Tenn.) 512. But in Maine by statute, and in Missouri, *Dickson v. Desire*, 23 Mo. 151; Indiana, *Martin v. Baker*, 5 Blackf. (Ind.) 232, and Ohio, *Devone v. Sunderland*, 17 Ohio, 52, as well as in England, *Kingdom v. Nottle*, 4 M. & S. 53, such covenants are treated as continuous and pass with the land, though broken before assignment. And, even though a covenant may run with the land, yet it does not so run against the clear intention of the grantor, or unless there is such language used as shows that it was intended to pass the benefit or burden. This was illustrated in a recent English case: *Renols v. Cowlinshaw*, 41 L. T. N. S. 116; in which the owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendant's predecessor in title, who entered into covenants with the vendors and their assigns, restricting their right to build on and use the purchased land. The same vendors afterward sold the residential estate to the plaintiff's predecessor in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them. There was, moreover, in the plaintiff's conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned. In an action by the plaintiffs to restrain the defendants, who had purchased the land first sold, as above mentioned, with notice of the first-mentioned restrictive covenants, from building in contravention of those covenants, it was held, that although the plaintiffs were "assigns of the original covenanters, they were not entitled to sue upon the original covenants." See *Keates v. Lynch*, 20 L. T. N. S. 255; *Child v. Douglass*, 23 L. T. O. S. 140, 282. As there can be no covenant except the contract is under seal, it follows that no burden can be imposed upon the land except by contract under seal: *Elliott v. Johnson*, 8 B. & S. 38; nor by a covenant entered into *after* the original lease or grant has been delivered: *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; but, while such a covenant neither creates an easement or runs with the land, yet it will be enforced in equity against a subsequent grantee with notice.

A covenant which runs with the land may be divisible and follow the land; therefore an action of covenant will lie against an assignee of part of the premises leased. When a covenant running with the land is divisible in its nature, and the entire interest in different parts of the land passes by assignment, the assignee of each part will be exclusively liable

for a breach which relates to that part alone. *Astor v. Miller*, 2 Paige Ch. (N. Y.) 68. Where, from the subject-matter of the covenants it is the evident intent of the parties that they should be taken distributively, they may be so taken, although there be no words of severalty. *Ludlow v. M'Crea*, 1 Wend. (N. Y.) 228; *Ernst v. Bartle*, 1 Johns. Cas. (N. Y.) 310; *Walker v. Webber*, 12 Me. 65; 1 Roll. 522, l. 5; *Conan v. Kemise*, W. Jon. 245; *Congham v. King*, Cro. Car. 221. Thus, where two houses were leased, with a covenant on the part of the lessee for himself and his assigns to repair, and the lessee assigned one of them, an action against such assignee for not repairing it was held to be maintainable; so in case of eviction the rent may be apportioned as in debt or replevin. *Stevenson v. Lambard*, 2 East, 575. So it seems, an action lies by an assignee of part of the estate demised, or the assignees of several parts may join. Com. Dig. tit. Covenant (B), 3. An assignee of five-sixths of an underlease, who is tenant in common with the assignee of the other sixth, may sue on a covenant by the original lessee to procure a renewal of the original lease. *Simpson v. Clayton*, 4 Bing. N. C. 758. The assignee of part of an estate is not liable for rent for the whole. *Holford v. Hatch*, 1 Doug. 183; *Hare v. Cator*, Cowp. 766. In *Curtis v. Spitty*, 1 Bing. N. C. 756, TINDAL, C. J., said: "The proposition contended for by the plaintiff, is this: that the lessor may charge the assignee of *part* of the land in an action of debt with the rent of the whole of the land comprised in the original demise. He may undoubtedly, after an assignment of part, *distrain* upon the whole; because the rent for the whole becomes due out of every part of the land; but in that case it must be remembered that the avowry would be for the rent due from the original tenant, and nothing would appear upon the record as to the assignment." Covenants are joint or several, according to the interest of the parties, unless expressly made either joint or several, in which case they cannot be construed otherwise than as the parties intended. *Withers v. Birchem*, 3 B. & C. 254; *Sorsbie v. Park*, 12 M. & W. 158; *James v. Emery*, 8 Taunt. 245; *Bradburn v. Batfield*, 14 M. & W. 559; *Anderson v. Martindale*, 1 East, 497; *Keighley v. Watson*, 3 Exch. 716; *Eccleston v. Clipsham*, 1 Wm. Saund. 153; *Slingsby's Case*, 5 Coke, 18 a; *Wollaston v. Hake-will*, 3 M. & G. 297. But if a lessee grants or assigns part of his estate, yet the entire privity of the contract is not at an end, and the lessee would, it seems, remain liable on his covenant to pay the entire rent, for he cannot apportion it. *Broom v. Hore*, Cro. Eliz. 633; *Ards v. Watkin*, Cro. Eliz. 637; *Stevenson v. Lambard*, 2 East, 575, 579; *Woods, Landlord and Tenant*, 499.

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